Pages 1 to / à 72

are withheld pursuant to section

sont retenues en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Pages 73 to / à 75

are withheld pursuant to sections

sont retenues en vertu des articles

23, 69(1)(g) re (a)

of the Access to Information Act

de la Loi sur l'accès à l'information

Blue, Amy

From: Tarlton, Jonathan
Sent: Friday, January 16, 2015 11:26 AM
To: * AFN Justice Group
Subject:
Attachments:

Thanks,

JT

s.23

From: Tarlton, Jonathan
Sent: Wednesday, January 14, 2015 10:38 AM
To: 'Krista Robertson'; Kim Ford (Kimberlee.Ford@aadnc-aandc.gc.ca)
Cc: * AFN Justice Group
Subject:

Pages 77 to / à 93

are withheld pursuant to section

sont retenues en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Blue, Amy

From: Tarlton, Jonathan
Sent: Monday, January 19, 2015 10:32 AM
To: 'Krista Robertson'; Kim Ford (Kimberlee.Ford@aadnc-aandc.gc.ca)
Cc: * AFN Justice Group
Subject: FW: FNCFCSC et al. v. AGC (T1340/7008)
Attachments: 14662295.pdf

FYI and records.

s.19(1)

From: Mah, Janice
Sent: Monday, January 19, 2015 10:27 AM
To: 'dragisa.adzic@chrt-tcdp.gc.ca'
Cc: 'philippe.dufresne@chrc-ccdp.gc.ca'; 'Daniel Poulin'; 'Sarah Pentney'; 'samar.musallam@chrc-ccdp.gc.ca'; 'dtaylor@powerlaw.ca'; David Nahwegahbow; 'Stuart Wuttke'; [redacted] 'justins@stockwoods.ca'; Tarlton, Jonathan; Chan, Melissa; Hallett, Gillian; Cameron, Sabrina; Arsenault, Nicole; MacPhee, Patricia; Harvey, Ainslie; McCormick, Terry
Subject: FNCFCSC et al. v. AGC (T1340/7008)

Good morning,

Attached is correspondence from counsel Jonathan Tarlton in the above-noted matter.

Kind regards,

Janice Mah
Paralegal | Parajuriste
Civil Litigation and Advisory Services | Contentieux des affaires civiles et services consultatifs
Department of Justice Canada | Ministère de la Justice du Canada
Atlantic Regional Office | Bureau régional de l'Atlantique
Suite 1400, 5251 Duke Street | Pièce 1400, 5251, rue Duke
Halifax, Nova Scotia | Halifax, Nouvelle-Écosse B3J 1P3
Tel | Tél. : (902) 426-0092
Fax | Téléc.: (902) 426-2329
janice.mah@justice.gc.ca
Government of Canada | Gouvernement du Canada

Department of Justice Canada | **Ministère de la Justice Canada**

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-8796
E-Mail: jonathan.tarlton@justice.gc.ca

Via Email

January 19, 2015

Dragisa Adzic
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street - 11th Floor
Ottawa, Ontario K1A 1J4

Dear Mr. Adzic:

Re: ***First Nations Child and Family Caring Society et al. v Attorney General of Canada*** **(T1340/7008)**

We wish to acknowledge receipt and thank the Panel for providing its ruling (2015 CHRT 1) appended to your correspondence dated January 14, 2015.

In accordance with their directions, the Respondent advises that it intends to provide comments respecting those documents listed in Appendix B of the Commission's December 1, 2014 letter to the Tribunal, and supporting submissions, with the exception of Tab 66.

Presently we envision our response will take the form of a chart, similar to the Commission's and Complainants' Chart, which we will provide to the parties and the Tribunal no later than February 4, 2015.

Respectfully yours,

Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

cc: Philippe Dufresne / Daniel Poulin / Sarah Pentney / Samar Musallam, Counsel for the Commission
David Taylor / Anne-Marie Levesque, Counsel for the Caring Society
David Nahwegahbow / Stuart Wuttke, Counsel for the AFN
Michael Sherry, Counsel for the Chiefs of Ontario
Justin Safayeni, Counsel for Amnesty International

Canada

Pages 96 to / à 188

are withheld pursuant to section

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23

of the Access to Information Act

de la Loi sur l'accès à l'information

Blue, Amy

From: Mah, Janice
Sent: Tuesday, February 03, 2015 5:07 PM
To: 'Krista Robertson'
Cc: Kimberlee Ford; * AFN Justice Group
Subject: [redacted]
Attachments: s.23

Krista,

[redacted]

Have a good evening.

Janice

Janice Mah
Paralegal | Parajuriste
Civil Litigation and Advisory Services | Contentieux des affaires civiles et services consultatifs
Department of Justice Canada | Ministère de la Justice du Canada
Atlantic Regional Office | Bureau régional de l'Atlantique
Suite 1400, 5251 Duke Street | Pièce 1400, 5251, rue Duke
Halifax, Nova Scotia | Halifax, Nouvelle-Écosse B3J 1P3
Tel | Tél. : (902) 426-0092
Fax | Téléc. : (902) 426-2329
janice.mah@justice.gc.ca
Government of Canada | Gouvernement du Canada

Pages 190 to / à 214

are withheld pursuant to section

sont retenues en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Blue, Amy

From: Tarlton, Jonathan
Sent: Tuesday, February 03, 2015 4:27 PM
To: Mah, Janice
Subject: RE:

[redacted]

From: Mah, Janice
Sent: Tuesday, February 03, 2015 4:26 PM
To: Tarlton, Jonathan
Subject: RE:

[redacted]

From: Tarlton, Jonathan
Sent: Tuesday, February 03, 2015 4:22 PM
To: Mah, Janice
Cc: * AFN Justice Group
Subject:

s.23

[redacted]

Jonathan D.N. Tarlton

Senior Counsel | Avocat-conseil
Department of Justice Canada | Ministère de la Justice Canada
Atlantic Regional Office | Bureau régional de l'Atlantique
Suite 1400, Duke Tower | Pièce 1400, Tour Duke
5251 Duke Street | 5251 rue Duke Halifax, Nova Scotia | Halifax, Nouvelle Écosse B3J 1P3

tel. | tél.: (902) 426-5959
fax | téléc.: (902) 426-8796
jonathan.tarlton@justice.gc.ca

Blue, Amy

From: Mah, Janice
Sent: Tuesday, February 03, 2015 9:54 AM
To: Tarlton, Jonathan
Subject: RE: AFN

Ok. [redacted]

-----Original Message-----
From: Tarlton, Jonathan
Sent: Tuesday, February 03, 2015 9:51 AM
To: Mah, Janice
Subject: AFN

s.23

I will be in the office soon. [redacted]

JT
Jonathan D.N. Tarlton
Senior Counsel/Avocat-conseil

Via Blackberry

Blue, Amy

From: Sweeney, Justina
Sent: Wednesday, February 04, 2015 2:41 PM
To: 'Dragisa.Adzic@chrt-tcdp.gc.ca' s.19(1)
Cc: 'DANIEL.POULIN@chrc-ccdp.gc.ca'; 'sarah.pentney@chrc-ccdp.gc.ca'; 'samar.musallam@chrc-ccdp.gc.ca'; 'philippe.dufresne@chrc-ccdp.gc.ca'; 'dtaylor@juristespower.ca'; 'dndaystar@nncfirm.ca'; 'swuttke@afn.ca'; [redacted] 'JustinS@stockwoods.ca'; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; McCormick, Terry; Harvey, Ainslie; Mah, Janice; Cameron, Sabrina
Subject: FW: re FNCFCSC et al. v. AGC (T1340/7008) - Response of the AGC to the Tribunal Ruling 2015 CHRT 1

Dear Mr. Adzic and counsel,

Attached please find the Response of the AGC to the Tribunal Ruling 2015 CHRT 1.
Have a good afternoon.

Regards,

Justina Sweeney,
Assistant to Jonathan Tarlton

AFN - RESPONSE OF THE AGC TO...

Justina Sweeney
Legal Assistant
Civil Litigation & Advisory Section
Atlantic Regional Office / Bureau Régional de l'Atlantique
Department of Justice / Ministère de la Justice Canada
5251 Duke Street, Suite 1400 / 5251, rue Duke, Pièce 1400
Halifax, Nova Scotia B3J 1P3 / Halifax (Nouvelle-Écosse)
tel. / tél.: (902) 426-6982
fax / télec.: (902) 426-8796
mailto:justina.sweeney@justice.gc.ca
Government of Canada / Gouvernement du Canada

Department of Justice Canada
Ministère de la Justice Canada

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-8796
E-Mail: jonathan.tarlton@justice.gc.ca

Via Email to dragisa.adzic@chrt-tcdp.gc.ca

February 4, 2015

Dragisa Adzic
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street - 11th Floor
Ottawa, Ontario K1A 1J4

Dear Mr. Adzic:

Re: ***First Nations Child and Family Caring Society et al. v Attorney General of Canada*** **(T1340/7008)**

Enclosed for the Panel's review and consideration below are our written representations on the documents subject to the Tribunal's recent ruling (2015 CHRT 1).

By way of background, the claim before the Tribunal is primarily based on the allegation that the federal government does not fund child and family service providers for First Nation children living on reserve to the same level that service providers off reserve are funded by the provincial and Yukon governments and that such differential funding constitutes discrimination. The comparison of adverse funding differentiation, as acknowledged during the testimony of one of the Complainants, is between on-reserve First Nation children and all other children resident in a given Province or territory.[1]

The other parties are asking the Tribunal to find that certain parts of the statements and information contained in these documents are true and support their allegations. While it is not always clear which legal principle or rule of evidence they rely upon, it appears they are relying upon the proposition: (i) that the documents contain relevant opinion supporting their claims; (ii) that they contain admissions against interest; (iii) that the statements in the documents support certain inferences being offered by the claimants; and, finally, (iv) that the parties' characterization of the documents as being either public and/ or business records enhances their probative value.

It is our position that the above proposition is not well-founded for the reasons set out below. We continue to rely on and repeat paragraphs 142-156, 163-170 and 179-184 of our written Closing Argument; they are located at pages 36-42 and 44-45. We also attach a chart that summarizes our position in respect of each document.

[1] *Complaint Form*, HR-1, Tab 1; *Cross-examination of Dr. Cindy Blackstock*, Transcript, Vol. 49 (February 13, 2014) at p. 84, lns. 5-15

Canada

Proposition (i): The Respondent says the tendered opinion evidence is not confined to factual observation.

First, some of these documents contain statements properly characterized as 'opinion' evidence going to a question of law or mixed fact and law. A witness cannot give opinion evidence on a legal issue because such an opinion does not qualify as being factual observations. For example, an opinion that the FNCFS program is not comparable or equitable to child welfare services available off reserve is a conclusory statement concerning the application of legal standards under the *Canadian Human Rights Act*.[2] In matters of legal interpretation, it is only the decision of the Tribunal and the courts that matters.

Even allowing for more relaxed rules regarding the reception of evidence before the Tribunal, such rules do not assist in determining the weight to be accorded to the evidence. In light of the above principles, the Tribunal should give this evidence no weight whatsoever.

Proposition (ii): The Respondent says that the documents do not meet the criteria for being admissions it has made or adopted against interest.

It appears that many of the documents tendered by the other parties are being offered as evidence of an admission against interest. The question to be determined by the Tribunal is to whose admissions, and on what matters, has the Respondent committed.

The information in these documents does not constitute any admission. At best, the information reflects personal views of employees of the department at particular points in time. While these documents have been admitted into evidence, the Tribunal should assess their weight contextually with reference to the Respondent's *viva voce* evidence regarding their proper interpretation.

When weighing the evidence, the Tribunal must also consider the scope of the author's authority to prepare the document in question.[3] The other parties have not presented sufficient evidence to identify the authors or what their function as a Crown servant may have involved. Without such evidence, it is impossible to establish a vicarious admission being made by someone having the requisite authority on behalf of the Respondent.

An example of the potential mischief such a lack of an evidentiary foundation can cause is found in Tab 169 (CAN002052). According to our best information, the Respondent disclosed this document in October 2009 along with an attached covering letter from the Samson Cree Nation (CAN002051). The other parties did not put the attached letter into evidence and chose not to call anyone from the First Nation community with personal knowledge of the document and its contents to speak to it.

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[2] *Graat v. R.* [1982] 2 S.C.R. 819 at p. 839; *Fisher v R*, 1961 CarswellOnt 7, at para. 46

[3] *Daum v. Schroeder*, 1996 CarswellSask 440 (Q.B.), at para 18

The other parties also conflate the mere reporting of a statement or opinion of a third party by a Crown servant as being evidence of the Respondent's acceptance or belief in the truth of such statement or opinion. That does not correctly accord with the law on this subject.

Of course if a party indicates a belief in or acceptance of a hearsay statement made by another then that is some evidence of the truth of its contents. The weight to be given to that evidence is for the trier of fact to determine. On the other hand, if the party simply reports a hearsay statement without either adopting it or indicating a belief in the truth of its contents, the statement is not admissible as proof of the truth of the contents.[4] Examples of such reporting can be found in most, if not all of the documents that are subject to the recent ruling, e.g. Tabs 192 and 189.

Proposition (iii): The statements or views in the documents do not support the inferences being asserted by the other parties.

The other parties have said they are relying on a constellation of documents to infer that the Respondent provides less funding for child welfare to on-reserve First Nations than the provinces provide off reserve.[5] At the same time, they acknowledge they lack information about the problems faced by provinces in their own delivery of child welfare services to First Nations peoples.[6]

They also called no witness with personal knowledge of these important matters and they have not explained why they did not do so.

In the absence of such evidence of personal knowledge, the other parties are really asking the Tribunal to engage in conjecture rather than draw legally justifiable inferences from the relevant information contained in these documents.

A conjecture, even if it may be plausible, is of no legal value. Its essence is that it is a mere guess. An inference involves a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.

Moreover, to the extent that any inference can be drawn, it is opposite to that advanced by the other parties. Perhaps the best example of this is found at Tab 475 (CAN112675).

This document is entitled "Social Development Progress Report" and dated September 2004. It predates the inauguration of the EPFA. At page 36 under the bullet "Observations", the author(s) of this document say(s) that "... [children-in-care] rates on-reserve are much higher than for the population as a whole. The [children-in-care] rates for First Nation children off-reserve is even higher – indicates strong need for collaborative approach with provinces." (Underlining added)

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[4] *Streu v. R.*, 1989CarswellAlta514, [1989] 1 S.C.R. 1521, at para. 21

[5] For example, see: *Cross-examination of Dr. Cindy Blackstock*, Transcript, Vol. 49 at p. 93, lns. 8-10

[6] *Cross-examination of Dr. Cindy Blackstock*, Transcript, Vol. 49 at p. 121, lns. 11-20

At page 38 there is a chart examining the "Children in Care % of 0-18 Population" and it considers both on- and off-reserve status children in BC, Alberta, Saskatchewan and Manitoba. The rates for on-reserve status children are between 5.2-5.6%. The comparable rates for off-reserve status children in care fall between 7.8% (Sask.) and 15.2% (Man.).

These results contradict the underlying premise of the complaint, i.e. that the impugned funding has resulted in adverse differentiation and constitutes a discriminatory practice under the *CHRA*. If that premise were supported by the evidence (which is not admitted) then the observations made in this document should be quite different.

These documents do not support the other parties' assertion that the high number of First Nation children on reserve in care is a result of the Respondent's funding. Instead the evidence only supports the inference that First Nation children are equally over-represented in the child welfare system whether they live on or off reserve, whether they are funded federally or by the provincial/territorial governments.[7]

This inference is confirmed by the Caring Society's own expert witness, Dr. Trocmé. When asked if he could draw a conclusion as to whether the level of federal funding versus provincial funding was having an adverse impact for First Nation on-reserve children, Dr. Trocmé made it clear that one must be "very careful" in trying to compare funding on and off reserve. "It's not just an on/off Reserve distinction, it's also Reserve versus urban aboriginal distinction. You really are comparing apples and oranges."[8]

Dr. Trocmé also said that the level of needs and percentage of children in care *per capita* were basically equivalent on and off reserve and his statement was acknowledged by Dr. Blackstock.[9] None of the evidence contained in the documents that are subject to this recent ruling disturb his testimony.

The only permissible inference that the Tribunal can draw on the facts is that there is no comparison that can made between federal and provincial funding levels showing discrimination.

Tabs 111 (CAN001722), 172 (CHRC 596) and 200 (CHRC 634) also support our earlier arguments showing the impugned funding under EPFA is based upon a framework that is the product of prior discussions and consensus reached between the federal and provincial governments and First Nations, including assumptions and agreed estimates regarding the 6% children-in-care rate and the caseworker ratio for prevention services. Further, no witness with personal knowledge to the contrary was ever called to testify.

---

[7] See also: *Testimony of Dr. Nico Trocmé*, Transcript, Vol. 8 (April 4, 2013), at pp. 26, 38-39, 45, and 46

[8] *Testimony of Dr. Nico Trocmé*, Transcript, Vol. 8, at p.51

[9] *Cross-examination of Dr. Cindy Blackstock*, Transcript, Vol. 49 at p. 125, lns. 12-19

Proposition (iv): The documents and excerpts being relied upon do not always fit within the common law and statutory definition of a 'public document' or 'business record'.

The other parties have previously said they consider all of the documents in the Respondent's disclosure as being admissible for the truth of their contents by virtue of their being "public documents" or business records. Given the relevant common law and statutory criteria, such an approach overshoots the mark.

As the Tribunal has already determined these documents form part of the record, then, the remaining issue is what, if any, weight should be given to them. We say that the weight will depend on the context in which they were made.

Even without the more relaxed rules for their reception under the *CHRA,* documents will meet the applicable common law or statutory criteria for admissibility as "public documents" without proof on the basis of their inherent reliability because documents made by a public official for the information of the Crown or its subjects, who may require the information they contain, are presumed to be true when they are made. Conversely, if the requisite intention to be public (as opposed to private) is not obvious by the document or the legislation governing its creation, evidence must be called to prove it was intended to be public.[10]

Similarly, documents of a private nature, prepared for internal use, or with the intention that they will remain confidential do not meet the above criteria.[11] Documents that are marked as "draft", "secret", "confidential, or "for discussion purposes only" should not be considered public documents.[12] Documents created outside of the scope of the official's authority, and unauthorized reports and records should receive no greater recognition than that afforded to similar documents prepared by independent and honest private citizens.[13]

The exceptions created for business records relate to their reliability as having been regularly kept in the course of business. However, policy documents and memoranda do not fall within the definition of a business record.[14]

It is our position that these documents do not meet the above criteria for public documents and the other parties have not called evidence to show they were intended to be public. Likewise, as previously stated at page two of these representations, to the extent these documents contain opinions, views or advice pertaining to a legal issue, they should not be treated as a court would receive a properly admitted business record.

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[10] *Daum* v. *Schroeder,* at para. 10

[11] *Supra*

[12] *Canada (Minister of Citizenship & Immigration)* v. *Seifert,* 2006 FC 270 2006, CarswellNat 494, at para. 6

[13] *Daum* v. *Schroeder*, at para. 18.

[14] *Seifert, supra*, footnote 12, at para.17

Conclusion

Upon further examination of the proposition being advanced by the other parties, the Respondent asks the Panel to give these documents little, if any, weight in determining whether the merits of the substantive complaint or the remedies being sought have been made out on a balance of probabilities. In our view they have not and the claim of discrimination should be dismissed as unfounded.

Respectfully yours,

Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

JDNT/jm

Enclosures:

1) Response of the Attorney General Canada (Chart)
2) Case Law

cc: Philippe Dufresne / Daniel Poulin / Sarah Pentney / Samar Musallam, Counsel for the Commission
David Taylor, Counsel for the Caring Society
David Nahwegahbow / Stuart Wuttke, Counsel for the AFN
Michael Sherry, Counsel for the Chiefs of Ontario
Justin Safayeni, Counsel for Amnesty International

LIST OF AUTHORITIES

1. *Response of the Attorney General Canada (Chart)*

Jurisprudence

2. *Graat v. R.*, [1982] 2 S.C.R. 819
3. *Fisher v. R.*, 1961 CarswellOnt 7
4. *Daum v. Schroeder*, 1996 CarswellSask 440 (Q.B.)
5. *Streu v. R.*, 1989 CarswellAlta 514, [1989] 1 S.C.R. 1521
6. *Canada (Minister of Citizenship & Immigration)* v. *Seifert*, 2006 FC 270 2006, CarswellNat 494

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. The Attorney General of Canada
Tribunal File No. T1340/7008
Responses to Documents listed in Appendix B of the Commission's December 1, 2014 letter

Tab	Prod. #	Date	Author	Recipient	Doc Type	Description	Party relying on	Portions	Issues			Response of the Attorney General of Canada
									INAC Provides a Service Pursuant to s. 5 of the CHRA	INAC Denies or Differentiates Adversely in the Provision of a Service Pursuant to s. 5 of the *CHRA*	Remedy	
Documents not Explicitly Referred to During the Oral Hearing or in Final Written Submissions												
9	CHRC299	12/31/1998	Minister of Indian Affairs and Northern Development	Public Domain	Report	Gathering Strength: Canada's Aboriginal Action Plan	AFN	Entire Document	X	X		With the possible exception of the 'Head Start' Program, the document does not mention or describe the FNCFS funding program. It is unclear how or why this document is either relevant or helpful in the determination of the merits of the complaint.
28	CHRC207	4/25/2008	Audit and Evaluation Sector, Audit and Assurance Services Branch (INAC)	Unknown	Manual	Internal Audit Manual: Version 1.0	FNCFCSC	Title Page, Pages 13, 15-19, 23-27, 35-73, Appendices I, J, N, O, P and S	X			This document is intended to provide guidance, tools and information for managing internal audit activity. It has little, if any, relevance or probative value to assist in the determination of whether the Respondent provides a service under s. 5 of the *CHRA*.
73	CHRC305	11/20/2009	Bill Zaharoff - Director, Intergovernmental Affairs, British Columbia Region	Nita Walkem - Chair, First Nations Director Forum (British Columbia)	Letter	Enhanced Prevention Funding Not Yet Available in British Columbia	FNCFCSC	Entire Document		X		The document is consistent with other evidence regarding the implementation of EPFA in BC and the Respondent's expressed commitment to work with the Province and the First Nations leadership. It does not assist the Tribunal in determining whether the Respondent denies or differentiates adversely.
111	CAN001722	00/00/0000	Unknown	Unknown	Document	Comparison of Old and New FNCFS Agency Funding in Alberta	FNCFCSC	Entire Document	X	X		The document confirms other evidence that the 'New Alberta' (EPFA) formula is based upon prior discussions and agreed upon assumptions

Tab	Prod. #	Date	Author	Recipient	Doc Type	Description	Party relying on	Portions	Issues			Response of the Attorney General of Canada
									INAC Provides a Service Pursuant to s. 5 of the CHRA	INAC Denies or Differentiates Adversely in the Provision of a Service Pursuant to s. 5 of the *CHRA*	Remedy	
												by the Alberta FNCFs agencies. Prevention funding is also based upon an agreed upon estimate between the federal and provincial governments and the First Nations.
148	CAN002052	7/9/2002	Unknown	Unknown	Document	Kasohkowew Child Wellness Society: Issues Related to INAC Funding	FNCFCSC	Entire Document	X	X		The document is an attachment to a letter sent to the Respondent by the Samson Cree First Nation (CAN002051) that was disclosed in 2009 but not put into evidence. The author was not called to shed light on the document or the views expressed in it. It should be given very little weight and cannot be used as an admission against the Respondent.
169	CHRC594	1/20/2012	Aboriginal Affairs and Northern Development Canada	Unknown	Document	Child Family Services Document Review Summary	FNCFCSC	Page 2	X	X		The document speaks to the ongoing development of a national information management system and the timelines for implementation. It does not assist the Tribunal in determining whether the Respondent provides a service or whether, assuming it does (which is not admitted), the Respondent denies or adversely differentiates in the provision of such service.
171	CHRC596	8/25/2009	Aboriginal Affairs and Northern Development Canada	Public Domain	Web page	Economic Action Plan - Canada, Québec and First Nations in Québec Reach an Historic Child Welfare Framework	FNCFCSC	Entire Document	X	X	X	The document confirms other evidence and testimony regarding the framework for the implementation of EPFA and the involvement of the

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. The Attorney General of Canada
Tribunal File No. T1340/7008
Responses to Documents listed in Appendix B of the Commission's December 1, 2014 letter

Tab	Prod. #	Date	Author	Recipient	Doc Type	Description	Party relying on	Portions	Issues			Response of the Attorney General of Canada
									INAC Provides a Service Pursuant to s. 5 of the CHRA	INAC Denies or Differentiates Adversely in the Provision of a Service Pursuant to s. 5 of the *CHRA*	Remedy	
												federal and provincial governments and First Nations in the Province. It does not support the other parties' claim of discrimination.
189	CAN000105	00/00/0000	Linda Jordan (INAC)	Chantal Bernier (INAC)	Memorandum	Meeting with Barrie Robb: Handicapped Children's Services (Alberta)	FNCFCSC	Entire Document		X	X	The document provides background information for a future meeting concerning funding for what is described as "handicapped children's services". Aside from the acknowledgement of concerns being expressed by others, the contents of the document contain no evidence that the Respondent denies or adversely differentiates in the provision of a service here.
192	CAN009375	12/13/2004	Unknown	Unknown	Document	Speaking Points - Domestic Affairs Committee	FNCFCSC	Entire Document	X	X		Aside from the author's acknowledgement of concerns being expressed by others, the contents of the document contains no evidence that the Respondent either provides a service under the CHRA; or, assuming that it does (which is not admitted), that the Respondent denies or adversely differentiates in the provision of a service here.
200	CHRC634	7/22/2009	Aboriginal Affairs and Northern Development Canada	Public Domain	Web page	Canada, Nova Scotia and First Nations in Nova Scotia Sign Historic Child Welfare Framework	FNCFCSC	Entire Document	X	X	X	The document confirms other evidence and testimony regarding the framework for the implementation of EPFA and the involvement of the federal and provincial

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. The Attorney General of Canada
Tribunal File No. T1340/7008
Responses to Documents listed in Appendix B of the Commission's December 1, 2014 letter

Tab	Prod. #	Date	Author	Recipient	Doc Type	Description	Party relying on	Portions	Issues			Response of the Attorney General of Canada
									INAC Provides a Service Pursuant to s. 5 of the CHRA	INAC Denies or Differentiates Adversely in the Provision of a Service Pursuant to s. 5 of the *CHRA*	Remedy	
												governments and First Nations in the Province. It does not support the other parties' claim of discrimination.
203	CHRC638	4/4/2012	Joe Behar - Manager, Strategic Policy and Planning, Atlantic Region (AANDC)	Ian Gray - Regional Director General, Atlantic Region (AANDC)	E-mail	Re: CFS Audit	FNCFCSC	Entire Document	X	X		The e-mail confirms other evidence and testimony of the Respondent regarding the implementation of EPFA in Nova Scotia, challenges facing the FNCFS agency there and the Respondent's efforts to assist. It does not support the other parties' claim of discrimination.
277	CAN006536 CAN006537	11/15/2007	Barbara D'Amico - Senior Policy Manager, Children and Families Directorate (AANDC)	Vince Donoghue - Social Services and Justice, Social Policy and Programs (AANDC) Odette Johnston - Director, Children and Family Services Directorate (AANDC) Stevèn Singer - Senior Policy Manger, Operations and Quality Management Directorate (AANDC)	E-mail & Document	2% Escalator on the Departmental Budget	AFN	Entire Document	X	X	X	The document outlines the background of the 2% departmental funding envelope beginning in the 1990s and the Government's intention to address this in Cabinet in future. It does not support the other parties' claim of discrimination.
311	CAN074399	6/5/2009	Unknown (AANDC)	Unknown	Document	The Québec Issue: How to Address Small Agencies	FNCFCSC	Entire Document	X	X	X	The document describes the background and concerns

First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. The Attorney General of Canada
Tribunal File No. T1340/7008
Responses to Documents listed in Appendix B of the Commission's December 1, 2014 letter

Tab	Prod. #	Date	Author	Recipient	Doc Type	Description	Party relying on	Portions	Issues			Response of the Attorney General of Canada
									INAC Provides a Service Pursuant to s. 5 of the CHRA	INAC Denies or Differentiates Adversely in the Provision of a Service Pursuant to s. 5 of the *CHRA*	Remedy	
												associated with supporting small agencies in Quebec and other jurisdictions. Important considerations include: fiscal inappropriateness because of economies of scale; and, bad social work methodologies. It also mentions that those concerns have also been expressed by others, e.g. the Auditor General of Canada. It does not support the other parties' claim of discrimination.
343	N/A (Disclosed by the AFN)	00/00/2013	Dr. Amy Bombay, Dr. Kim Matheson and Dr. Hymie Anisman	Public Domain	Article	Decomposing Identity: Differential Relationships Between Several Aspects of Ethnic Identity and the Negative Effects of Perceived Discrimination Among First Nations Adults in Canada	AFN	Entire Document		X		The authors suggest that discrimination is a significant factor in promoting poor health outcomes in the Aboriginal community. They do not provide any data or analysis regarding the impugned funding program specifically. It also appears they examine the issue by considering Aboriginal peoples as a whole- not just the on-reserve First Nation population. The authors assume that discrimination has already been established.
345	N/A (Disclosed by the AFN)	00/00/2003	Laurence Kirmayer, Cori Simpson and Margaret Cargo	Public Domain	Article	Healing Traditions: Culture, Community and Mental Health Promotion with Canadian Aboriginal Peoples	AFN	Entire Document		X		The authors suggest that the collective exposures of Aboriginal peoples to "forced assimilation policies" have been prime causes of poor health and social outcomes. They do not provide any data or analysis regarding the

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												impugned funding program specifically. It also appears they examine the issue by considering Aboriginal peoples as a whole- not just the on-reserve First Nation population. The authors assume that discrimination has already been established.
470	CAN112605	5/26/2005	Vince Donoghue - Social Services and Justice, Social Policy and Programs (AANDC)	Unknown	Document	Child and Family Services - Record Identifier 20 - Region Atlantic	CHRC	Entire Document	X	X	X	The author describes the practice of funding legal costs of agencies in Nova Scotia and New Brunswick. The document does not support the other parties' claim of discrimination.
471	CAN112606	00/00/0000	Vince Donoghue - Social Servicees and Justice, Social Policy and Programs (AANDC)	Unknown	Document	Child and Family Services - Record Identifier 25 - Region Atlantic	CHRC	Entire Document	X	X	X	The author describes the practice of funding court ordered medical tests and which federal department will pay for it. HQ to assume costs for the time being until the issue is resolved. The document does not support the other parties' claim of discrimination.
473	N/A (Disclosed by the Caring Society)	4/16/2014	Dwayne Johns - A/Director, Funding Services, Saskatchewan Region (AANDC)	Saskatchewan FNCFS Agency Directors	Letter & Document	Re: 2014-2015 Maintenance Rates and Invoicing Changes	FNCFCSC	Entire Document	X	X	X	The document discusses cost of living increases to provincial rates and adjustment to agencies' maintenance allocation to reflect these increases. It also describes upcoming changes to Agency invoices regarding monies collected by the Agency on behalf o f the child in its care. It does not support the other

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												parties' claim of discrimination.
476	CAN112687	00/00/2003	Unknown	Unknown	Presentation	Approaches to "Comparability" in Self-Government Agreements	CHRC	Pages 1, 4-27		X		The document is marked as being 'without prejudice' and "for discussion purposes only" and not intended for use by the public.
Documents Referred to Only in Final Written Submissions												
43	CHRC291	00/00/0000	American Jdurnal of Public Health	Public Domain	Article	Dr. Peter H. Bryce	AFN	Entire Document	X	X		It is unclear how or why this document is either relevant or helpful in the determination of the merits of the complaint.
207	CAN023711	1/17/2005	Joanne Crofford - Minister, Community Resources and Employment (Saskatchewan)	Honourable Andy Scott - Minister of Indian and Northern Affairs Canada	Letter	Re: Funding for Family Services and Supports	FNCFCSC	Entire Document	X	X		The January 2005 letter is from a provincial minister who expresses the views of her government. Such views do not assist the Tribunal in determining the merits of the complaint.
472	CAN112608	09/00/2005	Unknown	Expenditure Review Steering Committee	Presentation	First Nations Basic Services: Cost Drivers Project	CHRC	Pages 1-7, 11-14, 18, 23, 32-39	X	X	X	The document is marked as a "draft" and not intended for use by the public.
475	CAN112675	9/2/2004	Unknown	Assistant Deputy Minister (AANDC)	Presentation	Social Development Progress Report	CHRC	Pages 1-2, 4, 6-12, 14-18, 24-26, 36-42, 47-50	X	X	X	The document is not intended for use by the public. See pages 36 and 38.
477	CAN112749	2/1/2006	John Dance (AANDC)	Steven Singer - Senior Policy Manger, Operations and	E-mail	"Wow" Facts - Cost-Driver Project (Revised)	CHRC	Entire Document	X	X	X	The document is not intended for use by the public.

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				Quality Management Directorate (AANDC), et al.								
478	CAN113113	00/00/0000	AANDC	Unknown	Document	AANDC, Comprehensive Program Assessment Template, First Nations Child and Family Services Program	FNCFCSC	Entire Document	X	X	X	The document is marked "secret" and not intended for public use.
479	N/A (Disclosed by the Caring Society)	00/06/2014	Health Canada	Unknown	Document	Summary Note - LOP-NIHB Appeals	FNCFCSC	Entire Document		X	X	It is unclear how or why this document is either relevant or helpful in the determination of the merits of the complaint.
480	N/A (disclosed by Caring Society)	00/06/2014	Health Canada	Unknown	List	LOP Request	FNCFCSC	Entire Document		X	X	It is unclear how or why this document is either relevant or helpful in the determination of the merits of the complaint.
22*					Excel Spreadsheet	Reports - CFS stats - Cheat Sheet	AG					The document confirms the funding amounts at paragraph 47, page 12 of the Respondent's closing submissions, as well as the validity of assuming 6% as the children-in-care rate for the EPFA funding formula.

* - from Respondent's Book of Documents

Supreme Court of Canada

Graat v. R., [1982] 2 S.C.R. 819
Date: 1982-12-21

Anthony Graat *(Plaintiff) Appellant;*

and

Her Majesty The Queen *(Defendant) Respondent.*

File No.: 16189.

1982: October 12; 1982: December 21.

Present: Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Evidence—Opinion evidence—Non-expert witnesses—Impaired driving—Degree of intoxication—Whether police officers and other witnesses opinions as to impairment of accused admissible—Criminal Code, R.S.C 1970, c. C-34 as amended, s. 234.

The trial judge accepted the opinion evidence of two police officers that the appellant's ability to drive had been impaired by alcohol and convicted him under s. 234 of the *Criminal Code.* Appellant's appeals to the County Court and the Court of Appeal were dismissed. This appeal is to determine whether a court may admit opinion evidence on the question to be decided—here, whether the appellant's ability to drive had been impaired by alcohol.

Held: The appeal should be dismissed.

The question whether a person's ability to drive was impaired by alcohol is one of fact, not of law, and non-expert witnesses may give evidence as to the degree of a person's impairment. The guidance of an expert is unnecessary. The value of opinion will depend on the view the court takes in all the circumstances. The judges, however, should not consider the opinion of police officers in a preferential way merely because they may have extensive experience with impaired drivers. Here, the non-expert evidence was correctly admitted. The witnesses all had an opportunity for personal observations. They were not deciding a matter for the court to decide as the weight of the evidence is entirely a matter for the judge who could accept all or part or none of their evidence.

Wright v. Tatham (1838), 4 Bing. N.C. 489; *R. v. German* (1947), 89 C.C.C. 90; *R. v. Marks,* [1952] O.W.N. 608; *R. v. Zarins* (1959), 125 C.C.C. 375; *R. v. Beauvais,* [1965] 3 C.C.C. 281; *R. v. Pollock* (1947), 90

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C.C.C. 171; *R. v. Cox* (1948), 93 C.C.C. 32; *Giddings v. The King* (1947), 89 C.C.C. 346; *R. v. Smith* (1948), 17 Fortnightly L.J. 241; *Grimsteit v. McDonald* (1950), 96 C.C.C. 272; *R. v. MacDonald* (1966), 9 Crim. L.Q. 239; *R. v. Davies,* [1962] 1 W.L.R. 1111 (U.K.); *R. v. Neil,* [1962] Crim. L.R. 698; *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185; *Sherrard v. Jacob,* [1965] N.I.L.R. 151; *Burrows v. Hanlin,* [1930] S.A.S.R. 54; *R. v. Spooner,* [1957] V.R. 540; *R. v. Kelly,* [1958] V.R. 412; *Blackie v. Police,* [1966] N.Z.L.R. 910, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1980), 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247, 45 N.R. 474, 17 C.R. (3d) 55, 7 M.V.R. 163, dismissing appellant's appeal from a conviction for impaired driving. Appeal dismissed.

Edward L. Greenspan, Q.C., for the appellant.

Douglas C. Hunt, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—This appeal raises the issue whether on a charge of driving while impaired the Court may admit opinion evidence on the very question to be decided, namely, was the accused's ability to drive impaired by alcohol at the time and place stated in the charge.

I

The Procedural History

The appellant, Anthony Graat, was charged on August 10, 1978 at the City of London, County of Middlesex, while his ability to drive a motor vehicle was impaired by alcohol, he did drive a motor vehicle, contrary to s. 234 of the *Criminal Code.* He was tried, convicted, and sentenced to a fine of $300 or, in default, imprisonment for 30 days. An appeal to the County Court was dismissed. Leave to appeal to the Court of Appeal of Ontario was granted but the appeal was dismissed. The matter is now, by leave, before this Court.

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II

The Facts

At approximately 2:15 a.m. on the date in question, Constables Case and McMullen of the London City Police observed Mr. Graat's vehicle travelling at a high rate of speed. The constables followed for several blocks. They observed Mr. Graat's car weaving in the southbound lane, crossing the centre line on two occasions and driving onto the shoulder of the road on another occasion. When the vehicle turned left it straddled the centre line.

Both constables testified they noticed the smell of alcohol on the appellant's breath; both said Mr. Graat was unsteady on his feet, he staggered as he walked, and had bloodshot eyes.

At the police station Mr. Graat was observed by a Sergeant Spoelstra. The sergeant testified he smelled alcohol on the appellant's breath, the top part of his body was swaying, and his walk was "kind of wavy".

Mr. Graat complained of chest pains. He told the police he suffered from a heart condition and asked to be taken to a hospital. The police complied. By the time Mr. Graat returned to the police station it was too late to take two breath samples because the two-hour time limit for the taking of such samples had expired or was about to expire.

Mr. Graat testified he had had two drinks of gin between the hours of 3:00 p.m. and 7:00 p.m., and two glasses of wine with his dinner about 11:00 p.m. He said he and two friends, George Wilson and Vincent O'Donovan, were returning from a sailing party; he became tired. Wilson drove the car while he dozed in the back seat. The appellant resumed driving after Wilson had driven O'Donovan and himself home. Wilson testified that if he had thought Mr. Graat was not in a fit condition to drive he would have asked him to stay at his, Wilson's, house.

At trial Constable Case was asked the following questions and gave the following answers:

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> Q. All right, now what, if any, opinion having made those observations, what if any opinion did you form regarding the accused man's ability to drive a motor vehicle?
>
> A. I formed the opinion that the accused's ability was impaired.
>
> Q. By?
>
> A. By alcohol.

Q. You said the accused man's ability to what?

A. To drive a motor vehicle was impaired by alcohol.

Constable McMullen was asked the following question:

Q. Now officer when you were at the scene and having made the observations of the driving of the accused man, having observed him, having smelled the alcoholic beverage on his breath and observed him walk and observed him standing, observed him speaking to you what, if any, conclusion did you come to regarding his ability to drive a motor vehicle?

A. It was in my opinion that the accused's ability to operate a motor vehicle was impaired by alcohol beverage.

Sergeant Spoelstra, the desk sergeant, gave similar evidence:

Q. ...You saw him standing and you saw him walking. What, if any opinion, did you form regarding his ability to drive a motor vehcile?

A. In my opinion the accused's ability was impaired by the use of alcohol to drive a motor vehicle.

No objection was taken at trial to the admission of any of this evidence. Indeed, at the conclusion of the examination in chief of Sergeant Spoelstra, the following exchange took place:

MR. ALLAN: [Crown Counsel]

Your witness.

Q. Oh, wait a minute, what if any opinion, did you form regarding his ability to drive a motor vehicle from what you saw?

A. From what I saw.

THE COURT:

Just one moment, please. This man's a desk sergeant, he's not the man in the field, so to speak. Do you say I should permit him to give his opinion?

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MR. ALLAN:

> Your Honour, with respect, even if he didn't see the accused man driving, if the sergeant...
>
> MR. SILVER: [then counsel for the defence]
>
> I can save time, Your Honour, I'm quite content with it.
>
> THE COURT:
>
> Thank you. Proceed.

I do not think failure on the part of defence counsel to object to the admission of inadmissible evidence should, in the circumstances of this case, stand in the way of directing a new trial if such evidence is held to be inadmissible.

The trial judge preferred the evidence of the police witnesses to the evidence of Mr. Graat and Mr. Wilson. In particular, the judge relied on the evidence of Constable McMullen and Sergeant Spoelstra, policemen for 8 and 17 years respectively. Constable Case had only been a police officer for a few months, and had only charged two or three persons with impaired driving. The judge said he accepted the opinions of officers McMullen and Spoelstra in reaching his conclusion that the accused's ability to drive was impaired:

> I'm of the view that I'm entitled to accept and I do accept the opinions of those two police officers on the issue of impairment as part of the totality of the evidence.

On the appeal to the County Court, Judge McNab concluded there was direct evidence upon which the trial judge was justified in making a finding that the ability of the appellant to drive was impaired.

III

The Ontario Court of Appeal

The appellant sought leave to appeal to the Court of Appeal of Ontario and at that time the question was raised as to whether the trial judge had erred in law in relying on the opinion evidence of the two police officers that the appellant's ability to drive a motor vehicle had been impaired by alcohol.

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The Court dismissed the appeal, saying that the evidence was admissible under the exception to the rule excluding opinion evidence:

> ...that permits non-expert opinion evidence where the primary facts and the inferences to be drawn from them are so closely associated that the opinion is really a compendious way of giving evidence as to certain facts—in this case the condition of the appellant.

This echoes the words of Parke B. in *Wright v. Tatham* (1838), 4 Bing. N.C. 489 (at pp. 543-44):

> ...and though the opinion of a witness upon oath, as to that fact [testamentary capacity], might be asked, it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased.

On behalf of the Court of Appeal Chief Justice Howland delivered a lengthy, scholarly, judgment exhaustively reviewing academic opinion and case law relating to the exclusion of opinion evidence. He began with a passage from *Cross on Evidence,* 5th ed., 1979, at p. 442:

> In the law of evidence 'opinion' means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts.

The Chief Justice then spoke of two categories of opinion evidence that has traditionally been admissible: (i) cases calling for expert testimony in matters requiring specialized skill and knowledge, the only questions being whether the subject matter called for expertise and whether the witness was a qualified expert; (ii) non-expert opinion on matters requiring no special knowledge, where it is virtually impossible to separate the witness' inference from the facts on which the inference is based. In the opinion of the Chief Justice, the admission of opinion evidence in the latter circum-

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stance is merely a compendious way of ascertaining the result of the witness' observations.

After canvassing the case law in this country and a number of other countries, Chief Justice Howland summed up in the following passage:

> In my opinion, impairment is a degree of drunkenness. It is a compendious way of describing a condition based on observed facts. It does not require the evidence of a doctor or other expert, nor should it be limited to persons who themselves drive cars. It is a subject about which most people should be able to express an opinion from their ordinary day-to-day experience of life. To testify that a person is impaired is really tantamount to saying "I don't think that he should have been

> driving". In each case the opinion must be based on the observed facts: the car was weaving back and forth across the road, there was a strong odour of alcohol on the driver's breath, his powers of perception and coordination were poor, he was drowsy and was not reacting quickly to other cars or pedestrians in the path of his car, and so on. To exclude such non-expert evidence of witnesses who were passengers in the car of the accused or of other cars in the vicinity or who were pedestrians may result in an injustice to the accused and may at the same time impede the police in the prosecution of impaired drivers. Such evidence should be admissible. The weight to be given to such inferential testimony will vary from witness to witness, depending on the observed facts on which it is based.

The learned Chief Justice rejected the "ultimate issue" doctrine, *i.e.* that an opinion can never be received when it touches the very issue before the jury. He also noted that opinion evidence is properly rejected when it involves a legal component, such as the question of whether a person had acted negligently.

The judgment concludes:

> In my opinion the trial judge did not err in admitting as non-expert testimony the opinion evidence of the police officers as to impairment, and in relying on it as part of the totality of the evidence. Having reached this conclusion, it is not necessary to consider whether the police officers could have qualified as experts and what evidence would have been necessary for this purpose.

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> Accordingly, leave to appeal is granted, but the appeal is dismissed.

IV

The Case Law

The question in issue is a vexed one. The authorities in this country and elsewhere are by no means congruous. One of the earliest, and most frequently quoted cases is *R. v. German* (1947), 89 C.C.C. 90, a decision of the Ontario Court of Appeal involving charges of dangerous driving and driving while intoxicated. Counsel for the appellant submitted that the Crown was improperly permitted to introduce opinion evidence of persons who had no special qualifications. This evidence related to whether the accused was intoxicated, and was in a fit condition to drive. The Court observed that there were several matters on which a person of ordinary intelligence may be permitted to give opinion evidence based on

his personal knowledge, such as the identity of individuals, the apparent age of a person, the speed of a vehicle and whether a person was sober or not.

Robertson C.J.O. said (at p. 99):

> I am sure there have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion, but the answer is given as if nothing but a mere question of fact was involved.
>
> In the present case the evidence objected to is that of witnesses who saw the appellant and had opportunity of observing him. While some of the questions allowed to be answered were, I think, improperly framed, it was quite plain to the jury that these witnesses were ordinary observers applying their unskilled knowledge to what they actually saw, and, taken as a whole, I do not think any injustice was done by the occasional putting of a question that was unfortunately framed.

The case is of limited help as the degree of impairment was not really in issue.

German's case was discussed in *R. v. Marks,* [1952] O.W.N. 608, in which it was held that it was for the judge to decide whether in the light of the facts the police officer was "competent" to

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give an opinion as to any condition of impairment by consumption of alcohol. On the evidence in that case the judge held that the officers were not competent because they did not actually observe the accused driving his car and because they disagreed both about the state of intoxication and about the accused's ability to drive.

The next case is *R. v. Zarins* (1959), 125 C.C.C. 375, another impaired driving case, the judgment of the Ontario Court of Appeal being delivered by Porter C.J.O. Two short passages might be quoted (at pp. 380 and 382):

> I would adopt certain language of Harvey C.J.A. in *R. v. Cox* 93 Can.C.C. 32 at p. 36, [1949] 1 D.L.R. 524 at p. 528, and say that the fact of intoxication under s. 222, and impairment under s. 223 "may well be determined by observance of the conduct of the person charged as to which anyone can speak."

and

> Following this decision [the decision in *R. v. German, supra*], I think that the evidence of the police officers as to intoxication and impairment was clearly admissible.

From the Ontario authorities one would conclude that opinion evidence as to drunkenness, and as to impairment, are currently both admissible.

In British Columbia (*R. v. Beauvais,* [1965] 3 C.C.C. 281 (B.C.S.C.)) McFarlane J. adopted the reasoning of the Court of Appeal in Ontario in *R. v. German* and held that the opinions of the constables was lawfully admissible evidence on which the magistrate could find impairment.

In Alberta, it has been held that the constables could describe the accused's actions, appearance, language and general conduct and, in answer to a question framed as a question of fact, state the accused was drunk: *R. v. Pollock* (1947), 90 C.C.C. 171. In *R. v. Cox* (1948), 93 C.C.C., 32 (Alta. C.A.), Harvey C.J.A., delivering the judgment of the Court, said (at pp. 35-36):

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> It seems clear, however, that the purpose of the, prohibition of s. 285 is for the protection of people on the highway, and that when a person is in such a state of intoxication that his driving is a menace to the public safety, he must be intoxicated within the intention, and therefore the meaning, of the term as used in the section.
>
> That fact may well be determined by observance of the conduct of the person charged as to which anyone can speak, and that too perhaps with greater certainty than by any conclusions from the percentage of alcohol in the blood.

In some of the other provinces the position is more narrowly circumscribed. For example, in Prince Edward Island, Campbell C.J. held in *Giddings v. The King* (1947), 89 C.C.C. 346 that, in cases where intoxication is the very issue, it is neither helpful nor permissible for witnesses to state their own opinions or conclusions as to the fact or degree of intoxication, at least unless they relate the detailed symptoms on which their conclusions are based. In *R. v. Smith* (1948), 17 Fortnightly L.J. 241, the same judge held that only evidence of actual symptoms could be regarded, and evidence that the accused was intoxicated should be eliminated. An equally restrictive view was taken by Hogarth D.C.J. in *Grimsteit v. McDonald* (1950), 96 C.C.C. 272: "My opinion has always been that it is for a witness to state the facts and for the Court to draw conclusions from those facts" (at p. 286).

A midway position was voiced by O'Hearn C.C.J. in *R. v. MacDonald* (1966), 9 Crim. L.Q. 239 (at p. 241):

> I ruled that it would probably be improper for the witness to give as his opinion that the defendant's ability to drive a motor vehicle was impaired by alcohol or a drug, as this might involve a conclusion of law, but that any adult person with sufficient experience of the world may be asked his opinion of a person's condition with respect to intoxication.

England

Lord Parker, speaking on behalf of the Court-Martial Appeal Court in *R. v. Davies,* [1962] 1 W.L.R. 1111 was of opinion that a witness could

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properly give his impression as to whether another had "taken drink", but could not testify as to fitness or unfitness to drive. He reached his conclusion on two grounds (i) he is not in the expert witness category; (ii) that was the very matter the court had to determine on a charge of driving a vehicle on a road while unfit to drive through drink or drugs. The passage reads (at p. 1113):

> The court has come clearly to the conclusion that a witness can quite properly give his general impression as to whether a driver had taken [a] drink. He must describe of course the facts upon which he relies, but it seems to this court that he is perfectly entitled to give his impression as to whether drink had been taken or not. On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the very matter which the court itself has to determine. Accordingly, in so far as this witness and two subsequent witnesses, the lance-corporal and the regimental sergeant-major gave their opinion as to the appellant's ability or fitness to drive, the court was wrong in admitting that evidence.

In *R. v. Neil,* [1962] Crim. L.R. 698 a Courts-Martial Appeal Court (Winn, Widgery and Brabin JJ.) indicated that the scope of *Davies* "might call for consideration in future in relation to particular circumstances". The Court in *Neil* upheld the conviction on the somewhat tenuous ground that the members of the Court Martial "were not invited or directed by the Judge-Advocate to pay attention to opinion as distinct from observation".

Eire

An informative discussion of the point under review comes from Eire, *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185. Kenny was charged with driving a motor lorry while drunk. The prosecution proposed

to ask a police witness whether "in his opinion the defendant was drunk and incapable of driving the vehicle". The solicitor for the defend-

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ant objected to the question and submitted that the witness "not being a doctor or like expert was not qualified or competent to give evidence of his opinion of the defendant's condition". The prosecution replied that evidence as to drunkenness or sobriety need not necessarily be that of a medical practitioner or similar witness but that any ordinary witness would be qualified to give evidence on such matters. The District Justice thereupon agreed to state a case for the opinion of the High Court. The question for decision was whether evidence by a member of the Garda Siochana was admissible of his opinion that the defendant driver by reason of his being drunk, was unfit to drive a mechanically propelled vehicle? It was held by Davitt P. and on appeal by the Supreme Court of Eire (Lavery and O'Daly JJ., Kingsmill Moore J., dissenting) that the question asked should be answered "Yes". The evidence was admissible.

Northern Ireland

The same point arose in Northern Ireland in *Sherrard v. Jacob,* [1965] N.I.L.R. 151 on a stated case. The Court of Appeal held that opinion evidence of the police officers as to drunkenness was admissible but (Lord MacDermott L.C.J., dissenting) opinion evidence of the police officers as to capability to drive was not admissible. The majority of the Court followed *R. v. Davies.*

Australia

The Australian case of *Burrows v. Hanlin,* [1930] S.A.S.R. 54 held that mere opinion as to whether a man is drunk or whether he is capable of driving a motorcar, unsupported by facts, is not entitled to any weight. Murray C.J. said (at p. 55):

> Evidence of opinion can be given by experts on questions of science, but as to whether a man is drunk or whether he is capable of exercising effective control over a motorcar, mere opinion, unsupported by facts (I think I may go so far as to say), is not admissible evidence.

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The later case of *R. v. Spooner,* [1957] V.R. 540 expressed a less strict view, with which I find myself much in accord. Sholl J. said (at p. 541):

> I think I ought to say that my own view would be that it is not only a police officer who may be capable of expressing an opinion whether a man is so intoxicated as to be unable properly to drive a car. Many other persons have had experience in driving a motor-car, and have observed persons under the influencé of intoxicating liquor, and must, one would suppose, be in a position to form a view as to the capacity to drive. I see no magic myself in the fact that the witness is a police officer, or anything else. It depends largely, I suppose, on his actual knowledge of what is required in driving a motor car.

In *R. v. Kelly,* [1958] V.R. 412, Smith J. expressed the opinion that if the Crown is merely seeking from a witness a compendious description of what he actually observed, evidence in such form is not properly to be regarded as opinion evidence and the law of evidence does not forbid the giving of evidence in such form. Moreover, the law of evidence does not require that a witness should be qualified as an expert before he testifies.

New Zealand

In *Blackie v. Police,* [1966] N.Z.L.R. 910 the New Zealand Court of Appeal divided on whether an experienced traffic officer could give evidence as to whether a driver was so far intoxicated as to be incapable of having control of a vehicle. A majority of the Court held that a traffic officer or policeman who can show that he is sufficiently qualified by training or experience may be allowed to express his opinion in evidence as to a person's capacity to drive. The Court held also that the fact that a witness is either a traffic officer or a policeman does not, however, automatically qualify him to give opinion evidence on this topic.

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V

The Text Writers

Sir Rupert Cross in his work on *Evidence* (5th ed., 1979, p. 451) states that the existence of a particular issue may necessitate the reception of evidence which is not that of an expert and yet is nothing short of a witness' opinion concerning an ultimate issue in the case. The author adds, (at p. 452), that, subject to the exceptional type of situation, it would seem that, if non-expert opinion is in reality evidence of fact given *ex necessitate* in the form of evidence of opinion, there should be no question of its inadmissibility because it deals with ultimate issues.

Professor Cross continues (at p. 452):

> This is borne out by the form of s. 3(2) of the Civil Evidence Act 1972, which suggests that no change in the law was intended:
>
> > It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> So far as criminal cases are concerned, the decisions on drunken driving indicate a difference of approach between the English and Northern Irish courts on the one hand, and the courts of Eire on the other.

Professor Cross suggests (at p. 453) two main and two subsidiary reasons for the exclusion of non-expert opinion: In the first place it is said that opinion evidence is irrelevant and that this is largely true of non-expert opinion on a subject requiring expertise as well as opinion evidence concerning matters which do not call for expertise. Secondly, it is said that the reception of opinion evidence would "usurp the functions of the jury" in the sense that the jury would be tempted blindly to accept a witness' opinion. The two subsidiary reasons mentioned are the fact that a witness who merely speaks his opinion cannot be prosecuted for perjury, and the danger that the reception of such evidence might indirectly evade other exclusionary rules. Cross speaks of the first subsidiary reason as

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one of "some antiquity" and suggests that there is more force in the second reason, but that "it has not been stressed by the judges".

Professor Wigmore takes a diametrically opposed position. He states, (vol. 7, para. 1917, Chadbourn ed., 1978) that the disparagement of "opinion" always had reference to the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstances that incidentally he drew inferences from his observed data and expressed conclusions from them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing.

Wigmore refers to the theory that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, the theory being that of the exclusion of supererogatory evidence.

Wigmore uses strong language in discussing the "usurp the functions of the jury" theory (para. 1920). The phrase, he says, is made to imply a moral impropriety or a radical unfairness in the witness' expression of opinion. He says that "In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric". The author continues "There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the jury's function; nor could if he desired".

Turning then to an attack of the other theory, which would deny opinions of the "very issue before the jury" Wigmore has this to say:

> The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too

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> broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other that the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle [para. 1921].

VI

Law Reform Commission Reports

The Law Reform Commission of Canada has proposed an opinion rule based on facts perceived by the witness and on "helpfulness":

> Section 67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue [*Report on Evidence* (1975), Evidence Code, s. 67].

The Ontario Law Reform Commission proposed the enactment of the following section (Draft Act, Section 14):

> Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding [*Report on the Law of Evidence* (1976), pp. 150-53].

A majority of the Federal/Provincial Task Force on Uniform Rules of Evidence favoured the adoption of the proposal of the Law Reform Commission of Canada, embodied in s. 67 of the Commission's Evidence Code, rather than that of the Ontario Law Reform Commission. The majority opposed the proposal of the Ontario Law Reform Commission as being an enactment of the "collective facts rule" which allows non-expert opinion to be admitted on the basis that it is "a compendious mode of ascertaining the result of the actual observation of the witness". The majority felt that such

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an approach purported to draw an impossible and illogical distinction between "fact" and "opinion". The Task Force observed:

> Section 67 would allow a lay witness to testify in the form of opinion if it is relevant, within the realm of common experience and a shorthand expression of the witness's personal observation.

VII

Conclusion

I have attempted in the foregoing to highlight the opposing points of view as reflected in some of the cases, texts, and reports of the law reform commissions.

We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob, supra,* is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—*e.g.* whether distressed, angry, aggressive, affectionate or

depressed; (v) the condition of things—*e.g.* worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

To resolve the question before the Court, I would like to return to broad principles. Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though

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probative, the evidence must be excluded by a clear ground of policy or of law.

There is a direct and logical relevance between (i) the evidence offered here, namely, the opinion of a police officer (based on perceived facts as to the manner of driving, and *indicia* of intoxication of the driver) that the person's ability to drive was impaired by alcohol, and (ii) the ultimate *probandum* in the case. The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time. As for other considerations such as "usurping the functions of the jury" and, to the extent that it may be regarded as a separate consideration, "opinion on the very issue before the jury", Wigmore has gone a long way toward establishing that rejection of opinion evidence on either of these grounds is unsound historically and in principle. If the court is being told that which it is in itself entirely equipped to determine without the aid of the witness on the point then of course the evidence is supererogatory and unnecessary. It would be a waste of time listening to superfluous testimony.

The judge in the instant case was not in as good a position as the police officers or Mr. Wilson to determine the degree of Mr. Graat's impairment or his ability to drive a motor vehicle. The witnesses had an opportunity for personal observation. They were in a position to give the Court real help. They were not settling the dispute. They were not deciding the matter the Court had to decide, the ultimate

issue. The judge could accept all or part or none of their evidence. In the end he accepted the evidence of two of the police officers and paid little heed to the evidence of the third officer or of Mr. Wilson.

I agree with Professor Cross (at p. 443) that "The exclusion of opinion evidence on the ultimate

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issue can easily become something of a fetish". I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.

> When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
>
> > "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."
>
> There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general [at p. 448].

Before this Court counsel for the appellant took the position that although opinion evidence by non-experts may be admissible where it is "necessary" the opinions of the police officers in this case were superfluous, irrelevant and inadmissible. I disagree. It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If a witness is to

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be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree. I agree with the comment of Lord MacDermott L.C.J. in his dissent in *Sherrard v. Jacob, supra:*

> I can find no good reason for allowing the non-expert to give his opinion of the driver's observable condition and then denying him the right to state an opinion on the consequences of that observed condition so far as driving is concerned [at p. 162].

Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

If that be so it seems illogical to deny the court the help it could get from a witness' opinion as to the degree of intoxication, that is to say whether the person's ability to drive was impaired by alcohol. If non-expert evidence is excluded the defence may be seriously hampered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.

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I would adopt the following passage from the reasons of Lord MacDermott in *Sherrard v. Jacob, supra:*

> The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. On this it seems to

> me that the reasoning which has led me to the conclusion just stated applies as well to this branch of the matter. The driving of motor vehicles is now so much a matter of everyday experience for ordinary people that I find it difficult to see how inferential or opinion evidence as to being (a) under the influence of drink and (b) thereby unfit to drive a car can be placed in different categories for the purpose of determining admissibility. The one as much as the other seems to be within the capacity of the non-expert to form a reasonable conclusion [at p. 162].

A non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent. That is because such an opinion would not qualify as an abbreviated version of the witnesses factual observations. An opinion that someone was negligent is partly factual, but it also involves the application of legal standards. On the other hand, whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming, and the fact that a witness' opinion, as here, may be expressed in the exact words of the *Criminal Code* does not change a factual matter into a question of law. It only reflects the fact that the draftsmen of the *Code* employed the ordinary English phrase: "his ability to drive...is impaired by alcohol" (s. 234).

In short, I know of no clear ground of policy or of law which would require the exclusion of opinion evidence tendered by the Crown or the defence as to Mr. Graat's impairment.

I conclude with two caveats. First, in every case, in determining whether an opinion is admissible,

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the trial judge must necessarily excercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception, rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to

prefer the evidence of the police officer. Constable McMullen and Sergeant Spoelstra were not testifying as experts based on their extensive experience as police officers.

There was some confusion about this matter in this case as appears from the following cross-examination of Mr. Wilson:

> Q. ...And of course you've not and never have been a Police Officer. Do you agree or disagree with me?
>
> A. No. No.
>
> Q. You have never been a Police Officer?
>
> A. No.
>
> Q. And you're not in the habit of checking people as to the amount of alcohol that is consumed in order to make him impaired. Do you agree or disagree with me?
>
> A. I have to agree with you.
>
> Q. Yes. So you're really not in a position to tell us whether or not he was impaired or not impaired by alcohol. Do you agree or disagree with me?
>
> A. I was only...
>
> *[Page 841]*
>
> ...
>
> Q. ...But of course you were in no position to judge as to whether or not he was impaired. Do you agree or disagree with me?
>
> A. I don't have any qualifications in that regard I guess.

Mr. Wilson does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have

been closely associated with the prosecution, such association may affect the weight to be given to such evidence.

The trial judge was correct in admitting the opinions of the three police officers and Mr. Wilson.

For the foregoing reasons, as well as for the reasons given by Chief Justice Howland, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Greenspan, Moldaver, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario.

1961 CarswellOnt 7
Ontario Court of Appeal

Fisher v. R.

1961 CarswellOnt 7, [1961] O.W.N. 94, 130 C.C.C. 1 at 2, 34 C.R. 320

Regina v. Fisher

Porter C.J.O., Laidlaw, Aylesworth, Morden and McGillivray JJ.A

Judgment: February 9, 1961

Counsel: *J.B. Pomerant*, for accused.
W.C. Bowman, Q.C., and *F.L. Wilson*, for the Crown.

Subject: Criminal; Evidence

Related Abridgment Classifications

1961 CarswellOnt 7, [1961] O.W.N. 94, 130 C.C.C. 1 at 2, 34 C.R. 320

Headnote

Criminal Law --- Offences against person and reputation — Murder — Second degree murder — What constitutes means to cause death

Evidence --- Opinion evidence — Expert evidence — Hypothetical questions

Murder — Defence of drunkenness — Crown introducing evidence in chief by calling psychiatrist as witness — Question of directions to jury — Objection by defence that evidence of psychiatrist was inadmissible at that stage of the proceedings — Counsel for accused cross-examining psychiatrist — Issue of accused's mental capacity or incapacity by reason of consumption of large amounts of beer subsequently raised by defence — Court of Appeal divided as to proper practice to be followed — Appeal dismissed by a majority decision of the Court.

Accused was charged with murder. Accused did not deny the killing and he gave a statement to the police. The case for the Crown was based largely on this statement and the evidence of a psychiatrist who was called by the Crown in its evidence in chief. In his statement to the police the accused explained that at the actual time of the stabbing of the victim "I really went off my rocker, I guess, or I must have been drunk or a combination of both." Accused gave evidence at the trial. He was convicted of murder and he appealed alleging that the evidence of the psychiatrist was inadmissible and that there had been misdirection to the jury on the question of capacity to form an intent under Code s. 201(*a*) (ii). The submission of the defence was that there are two distinct capacities which the jury must consider under s. 201, namely (*a*) the capacity to form the intent to cause bodily harm; and (*b*) the capacity to know that it was likely to cause death. The defence argued that accused was so drunk as to be unable to form the intent to commit murder.

Held, (Porter C.J.O., and Laidlaw J.A. *dissenting*), the appeal should be dismissed.

1. The trial judge made it sufficiently clear to the jury that the intent required to bring his act under Code s. 201(*a*) (ii) involved knowledge on the part of accused of the likely consequences of his act and that his charge was fully in accordance with the law as enunciated in *MacAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166, 13 Can. Abr. 58; *Rex v. Linton*, [1949] O.R. 100, 9 C.R. 262, 93 C.C.C. 97, 3 Abr. Con. (2nd) 255, and *Malanik v. The Queen*. [1952] 2 S.C.R. 335, 14 C.R. 367, 103 C.C.C. 1, 3 Abr. Con. (2nd) 54.

2. The trial judge dealt fully, fairly and accurately with the psychiatrist's evidence in his charge to the jury when he instructed them that "You may accept part of the opinion and you may reject part of it. You may accept all of it or reject all of it. You may deal with it the same as you would any other direct evidence."

Practice Note:

"Alternative defences". A defence founded on "insanity" is one thing and a defence founded on "drunkenness" is quite another thing altogether. A defence of insanity is regulated by s. 16 of the Criminal Code which provides in subs. (4) thereof that "Every one shall, *until the contrary is proved*, be presumed to be and to have been sane." On the other hand drunkenness is a common law defence which has two aspects, (a) drunkenness of such a degree as to render accused incapable of forming the criminal intent constituting the crime charged in the indictment: and (b) drunkenness of a lesser degree: *Director of Public Prosecutions (Rex) v. Beard*. [1920] A.C. 479, 14 Cr. App. R. 159. Under the rule in *Beard's* case drunkenness can never excuse a crime but it may reduce murder to manslaughter for lack of intent where a man is so drunk as to make him incapable of forming an intent to kill, or of meaning to cause bodily harm: *MacAskill v. The King*. [1931] S.C.R. 330, 55 C.C.C. 81. [1931] 3 D.L.R. 166, 13 Can. Abr. 58, and Annotation *"Drunkenness as a defence"*. 7 C.R. 152, also *Capson v. The Queen*, [1953] 1 S.C.R. 44, 16 C.R. 1, 105 C.C.C. 1, 3 Abr. Con. (2nd) 61.

Appeal from a conviction for murder.

***Laidlaw J.A.* (*Porter C.J.O.* concurring) (*dissenting*):**

1 The appellant was tried before Thompson J. at the assizes at Toronto and he was convicted of murder of Margaret "Peggy" Bennett. He appeals to this Court against his conviction.

2 The deceased woman was stabbed to death by the appellant about one o'clock in the morning of the 10th June 1960. He was arrested on 21st June and on that day he made a statement to a police officer. The statement was typewritten. The appellant made some amendments to the statement and then signed it. He stated that on the night of 9th June he was at the Wembley Hotel with his wife and two persons (Douglas Zackariah and Hubert Vincent Baker) who were boarders in his home, and that his wife left them there and went home about 9:20 p.m. He gave an account of what he did and how he spent his time in the men's beverage room from then until the beverage room was closed at roughly 12:15 a.m. He described his meeting with the deceased woman soon afterwards and related in detail what he did and she did while they were together from the time of their meeting up to and including the moment when he stabbed her. He said that then he opened the door of his car and pushed her out. He described his flight from the scene and his search of the car "to see if there was anything of hers left in the car, mainly her purse." He told of the manner of disposal of the purse and what he did with the knife used by him to kill the deceased woman. He traced his movements to the time when he drove home, parked his car, met the two boarders with whom he had been drinking at the Wembley Hotel, and then went to bed. He said that he did not know that he had killed her until the next morning; that he heard it on the news. I note also these passages in the statement made by the appellant:

> I feel that I am in need of some type of psychiatric treatment. I am not trying to make excuses, but that is my honest opinion.
>
> The dead don't talk, and she had gotten me into such a state that I didn't know what I was doing. I read in the paper it was 16. I don't believe it myself. I don't think I stabbed her that many times. I really went off my rocker, I guess, or I must have been drunk or a combination of both.
>
> This goes without saying, I must need treatment. That's all there is to that.
>
> I didn't go out looking for this and I never have, and it was the last thought in my mind to pick anybody up that night. I would like to have treatment just to see if there is anything wrong with me or if I just done it in a passionate mood or momentarily insane, or something.

3 The case for the prosecution consisted mainly of the statement made by the appellant and, in addition thereto, evidence given by Dr. Norman Lewis Easton, a psychiatrist. Counsel for the appellant objected at trial to the admission of that evidence and made submissions at length in support of the objection. The main ground of appeal to this Court is that the evidence was not admissible and, because it will be necessary for me later to examine and discuss the evidence in some detail, I shall reproduce that portion of the transcript of proceedings at trial. [The learned judge then reproduced the portion of the transcript appearing *infra*, p. 336 in the judgment of Aylesworth J.A. and continued:]

4 Before considering the admissibility of that evidence I shall express my views respecting the course taken by counsel to prove the case against the appellant. At the stage of the proceedings at trial when the evidence of Dr. Easton was tendered in support of the case for the prosecution, the only evidence as to the amount of beer consumed by the appellant during the evening of 9th June, apart from that contained in his statement, was given by his companions Zackariah and Baker. Zackariah said that

the party of four (the appellant, his wife, Baker and Zackariah) went into the ladies' beverage room of the Wembley Hotel about 8:30 p.m. Mrs. Fisher "had a coke" and "we had a few beers and then we went down to the Men's Room," after Mrs. Fisher left the party about 9:20 p.m. They had "some beer" in the men's beverage room, and the appellant left Zackariah and Baker "to see some friends." He returned about three-quarters of an hour later and "had a beer with us ... He finished his beer and part of another one." Later he said in examination-in-chief "That makes three he had down there," that is, in the men's beverage room. On cross-examination he stated that he could not say how many beers the appellant drank that night. Baker stated that before Mrs. Fisher left the party in the ladies' beverage room, the others "had a glass or two of beer." On cross-examination he agreed that "Mr. Fisher had a considerable quantity of beer to drink that night." It is to be noted that there is no evidence that the appellant was drunk or that there was any indication of drunkenness at any time while he was at the Wembley Hotel. Of course, he did say in his statement "I really went off my rocker, I guess, or I must have been drunk or a combination of both" but I cannot regard that statement as proof of drunkenness. It was simply a feeble attempt on his part to excuse himself. In my opinion, there was no evidence at that stage of the proceedings from which a jury could reasonably find that he had consumed enough alcohol to affect his mental capacity to form the necessary intent to commit murder or upon which they could have any reasonable doubt as to his capacity to have that intent. An issue as to his mental capacity or incapacity by reason of the amount of beer consumed by him had not arisen at that stage of the proceedings. The issue did not arise until later when the appellant gave evidence on his own behalf and stated that he consumed between 20 and 25 glasses of beer in the period from 9:30 p.m. until shortly after eleven o'clock that night and could not remember any subsequent events.

5 In *Rex v. Smith* (1910), 6 Cr. App. R. 19 at 20 counsel for the Crown asked the Court (The Lord Chief Justice, Pickford and Avory JJ.) for a direction with regard to tendering evidence of a prisoner's sanity. He cited *Bunyan*, 151 Sess. Papers C.C.C. (Sept. 1909) where Coleridge J. had allowed him to call the prison doctor to prove sanity, no evidence of insanity other than by suggestion in cross-examination of the Crown witnesses having been offered by the defence. The Lord Chief Justice said:

> The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit.

6 That case was followed in *Rex v. Casey* (1947), 63 T.L.R. 487 and referred to in *Rex v. Abramovitch* (1912), 7 Cr. App. R. 145 and *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 475.

7 In *Rex v. Smith* (1912), 8 Cr. App. R. 72 the Court (Lord Alverstone C.J., Channell and Avory JJ.) at p. 75 made it plain that "Evidence as to the condition of the prisoner's mind should be called, if required, in reply, and not as part of the case for the Crown."

8 The basis of those decisions is the rule that it is for the defence to call the witnesses in relation to the topic of insanity, per Mr. Justice Morris in *Rex v. Casey, supra*. He pointed out the difficulty and embarrassment which might result if that rule is departed from. I may add that I have not overlooked the distinction between cases where insanity is relied upon as a defence and the onus of proof of that fact rests on the defence and cases in which "evidence of drunkenness which renders the accused incapable of forming the specific intent to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent." (per the Lord Chancellor in *Director of Public Prosecutions (Rex) v. Beard*, [1920] A.C. 479 at 501, 14 Cr. App. R. 159 at 194). In the latter class of cases the onus rests on the prosecution to satisfy the jury beyond reasonable doubt that the accused person had the mental capacity to form the essential specific intent to commit murder but nevertheless in my opinion there is no difference in principle or in procedure between the two classes of cases. It is presumed that the accused had the necessary mental capacity and evidence intended by the prosecution to establish that fact, if required, should not be given unless and until the issue has been clearly raised by the defence.

9 In the instant case counsel for the Crown could not anticipate that the accused would give evidence in defence creating the issue as to his capacity at the time he killed the deceased woman. He could not properly present evidence in the case for the prosecution in the expectation that the mental capacity of the accused might be put in issue at a later stage of the proceedings. If evidence in proof of the mental capacity of the appellant was required and was admissible then in my opinion it could only be given in reply.

10 When the evidence given by Dr. Easton was tendered and during the course of argument touching the question of admissibility of the evidence, neither counsel for the Crown nor for the defence was able to refer the learned trial judge to a single case of the same kind as the instant case in which evidence of the character given by Dr. Easton was admitted in support of the case for the prosecution. Again, in this Court, counsel could not refer to such a case, notwithstanding most diligent search. It appears to me to be remarkable, indeed, if evidence of the kind given by Dr. Easton is properly admissible in support of the case for the prosecution in a case of this kind that there is no recorded precedent. If such evidence is admissible on the basis that it would assist the jury to determine the primary and fundamental issue as to capacity of an accused person to have a specific intent to commit murder as charged, then all juries in all cases where such evidence would have been of assistance have been deprived of that benefit. I cannot think that the Crown has always been so unmindful of such evidence readily available to it in every such case, or that it has always been so remiss in not presenting it as part of the case for the prosecution. On the contrary, I believe that the Crown with full knowledge that such evidence was available realized fully and clearly that it would not be admissible for that purpose.

11 The question under consideration may be viewed in another way. In the absence of any record of a case of the same kind in which like evidence was admitted in support of the case for the prosecution, a trial judge might reasonably conclude that such evidence has not been heretofore regarded as admissible for that purpose. Certainly, the absence of any precedent would raise reasonable doubt as to the admissibility of it. That doubt should be resolved in favour of the accused and, for that reason, the evidence should not be admitted. Likewise, in this Court if it is not certain that the evidence is admissible as part of the case for the prosecution, the appellant should be given the benefit of any reasonable doubt and the trial should not be regarded as satisfactory.

12 I make this further observation: If evidence of the kind given by Dr. Easton is admissible as part of the case for the prosecution, it would be likewise admissible as part of the case for the defence. Thus, in cases where both the prosecution and the defence adduced such evidence, the learned trial judge presiding at trial might instruct the jury, as he did in the instant case, that "in matters which are technical, for instance as to mental capacity, we, as laymen, are not as proficient as those who have made careful studies of it and who treat mental diseases...." In response to such instruction the jury might and probably would rest its verdict on the evidence given by experts, and possibly upon evidence given by experts who, as in this case, base their opinions on hypothetical questions only, without any examination or observation whatsoever of the accused person.

13 I address myself now to an examination of the evidence given by Dr. Easton. First and foremost, it will be noted that there is no suggestion that he examined the accused at any time or that he made any observation of him as a basis of his opinion. His opinion is based wholly upon a hypothesis propounded *en bloc by* counsel for the prosecution. He was then asked by counsel to answer the very question to be determined in the case by the jury, namely, — "What is your opinion as to whether or not the accused, in stabbing the woman and inflicting those wounds, ... had the capacity to form the intent to cause death?" The answer made by him that in his opinion "he did have the capacity to form the intent" is the very finding of fact that had to be made by the jury before they could reach a verdict of guilty of murder, under s. 201(*a*) (i) of the Criminal Code. The answer made by the witness was a pre-judgment of the basic issue upon which the verdict of the jury depended. In *Regina v. Frances* (1849), 4 Cox C.C. 57, evidence was called on the prisoner's behalf to prove his insanity. A physician who had been in Court during the whole trial was then called on the part of the prosecution and asked whether, having heard the whole evidence, he was of opinion that the prisoner at the time he committed the alleged act was of unsound mind. It was held that such a question ought not to be put, but that the proper mode of examination was to take particular facts and, assuming them to be true, to ask the witness whether in his judgment they were indicative of insanity on the part of the prisoner at the time the alleged act was

committed. Alderson B. said: "To take the course suggested is really to substitute the witness for the jury and allow him to decide upon the whole case."

14 I refer also to *Doe d. Bainbridge v. Bainbridge* (1850), 4 Cox C.C. 456; *Sills v. Brown* (1840), 9 C. & P. 601, 173 E.R. 974, and *Crosfield & Sons (Limited) v. Techno-Chemical Laboratories (Limited)* (1913), 29 T.L.R. 378, at 379, in which Mr. Justice Neville, speaking in regard to admissibility of evidence of expert witnesses, said: "It is not competent in any action for witnesses to express their opinion upon any of the issues, whether of law or fact, which the Court or a jury has to determine."

15 There is a further objection to the course taken by counsel for the prosecution. The statement of assumed facts made by counsel and upon which the opinion was based, should not have been made *en bloc*. Moreover, the statement made in that way includes matters for consideration of the witness which could not in any event be given consideration in forming an opinion as to the mental capacity of the appellant when he killed the deceased woman and it omitted matters of vital importance which ought to have been taken into consideration. In *Regina v. Tilley*, [1953] O.R. 609, 17 C.R. 1 at 11, 106 C.C.C. 42, 5 Abr. Con. (2nd) 104, Roach J.A. referred to *Regina v. Frances, supra*, and Phipson on Evidence, 9th ed. p. 408. He said in part: "The proper course for Crown counsel to have followed was to put those alleged facts to each of the psychiatrists hypothetically, not *en bloc*, asking them to assume one or more of them to be true and to state their opinion thereon."

16 In the statement *en bloc* of assumed facts, as formulated by counsel for the prosecution, the witness was required to consider that the accused made a statement (ex. 60) on 21st June. I do not know how that fact touches in any way the question of the capacity of the accused at the time he killed the deceased woman on 10th June. Again, of equal or more importance, Dr. Easton was not invited or required to take into consideration the repeated statements of the appellant that he thought he needed psychiatric treatment. If it be assumed that the appellant believed he needed psychiatric treatment or that in fact he did need such treatment prior to the time he killed the deceased woman, then it would seem to me that those facts ought to have been given full consideration by Dr. Easton before expressing an opinion. Indeed, in the absence of such consideration, the opinion given by him was not only worthless as an aid to the jury, but was misleading to such an extent as to create substantial prejudice to the appellant.

17 Apart altogether from the objections which I have discussed *supra* to the admissibility in evidence of the opinion expressed by Dr. Easton, it is my view that the admission of his testimony was not justified because the necessary elements in law to make it admissible do not co-exist. In Beven on Negligence, 4th ed. at p. 141, the author says:

> To justify the admission of expert testimony two elements must co-exist:
>
> (1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.
>
> (2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

18 That statement is quoted and given authority in *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 at 683-4, [1931] 4 D.L.R. 102, 18 Can. Abr. 402. In my opinion, the jury in the instant case was just as capable as Dr. Easton of forming a correct judgment from the facts taken into consideration by him to determine the capacity of the appellant to form the necessary intent to commit murder. The basis of the opinion expressed by him appears clearly from his evidence. In short, he concluded that "any man who could do the things that he [the appellant] is alleged to have done" had the requisite capacity to form that intent. He referred in particular to the appellant "driving a car six miles and walking home to get his car and coming back to get the

girl". He referred also to "statements about events that followed" and proceeded to say "his attempt to explain behaviour, if one were to believe it, it shows that he is thinking and attempting to when he is making his statement, to defend himself ..." The learned trial judge then interrupted the witness at that point and properly ruled that he was not to give reasons for the appellant making his statement. On cross-examination, Dr. Easton stated that he did not know how much alcohol the appellant drank before he killed the deceased woman, but in forming his opinion he assumed that the appellant had consumed 25 bottles which, according to other evidence, would be about 37 glasses. I pause to note that at the stage of the proceedings when Dr. Easton expressed his opinion, there was no evidence on the record that would justify the assumption that the appellant had consumed that amount of beer during the evening of 9th June; and, further, I observe that to consume that quantity of beer during the time the appellant was in the Wembley Hotel he would have had to consume a glass of beer every five minutes, approximately, during a period of about three hours. That fact cannot be assumed from the evidence.

19 If the evidence given by Dr. Easton was intended by the Crown to assist the jury in considering the effect of alcohol on the mental capacity of the appellant, it fails entirely to accomplish that purpose. No opinion was expressed by the witness touching that question. Moreover, it does not appear from the record that Dr. Easton had gained any special knowledge, "by a course of study or previous habit", which secured his habitual familiarity with that matter. I am not willing to assume that merely because Dr. Easton is a psychiatrist of long experience in practice and in giving evidence in the courts on psychiatric questions that he had special knowledge that qualifies him to express an opinion as an expert touching the matter of the effect of alcohol on the mental capacity of a person to form a specific intent, and particularly in respect of a person who was never examined or observed by him for the purpose of forming such an opinion. Thus, one of the elements described in the rule respecting the admissibility of expert testimony, quoted *supra*, does not exist. If the purpose of the evidence given by Dr. Easton was, as I think it was, to prove by his opinion that the appellant had capacity to form the necessary intent to commit murder, because, as stated by him, "any man who could do the things that he is alleged to have done" had such capacity, then my view is that the evidence was not admissible for these reasons: It required Dr. Easton to draw an inference from an incomplete statement of assumed facts, none of which was symptomatic in nature, and thus to determine by his opinion the very issue of fact upon which the verdict of the jury depended. He was required to make that determination without regard to any possible pathological conditions peculiar to the appellant and without any examination or observation of him. In my opinion, his conclusion did not require the exercise of any special scientific or technical knowledge or skill. The issue respecting the capacity of the appellant to form the necessary intent to commit murder was an issue of fact requiring only the judicial exercise of sound judgment which the jury were fully qualified to give in the circumstances and upon the evidence in this case without any assistance of a psychiatrist or other expert. The question as to whether or not the appellant had the requisite mental capacity is not different in nature from the question whether or not a person has the requisite mental capacity to make a valid will. Sir J. Hannen, speaking of the question of sound mind, said in *Boughton and Marston v. Knight et al.* (1873), L.R. 3 P. 64 at 67:

> I desire particularly now, and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question, one in which the good sense of men of the world is called into action, and that it does not depend on scientific or legal definition.

20 That opinion is quoted by Roach J.A. in *Re Price; Spence v. Price*, [1946] O.W.N. 80 at 84, [1946] 2 D.L.R. 492, 10 Abr. Con. (2nd) 1127, and the learned justice adds:

> There may be cases in which a medical man could demonstrate by scientific analysis or observation that mental deterioration had progressed to the stage where testamentary capacity no longer existed. But that is not this case or that type of evidence.

21 In that case I expressed views to which I adhere and although they were dicta, I think they are apt in the instant case. I said:

> The quality of a person's mind manifests itself by conduct and expressions of thought. The conclusions to be reached from such evidence do not depend for their correctness upon the possession or exercise of special skill or knowledge. A judgment may be formed by a person of sound mind and reason, exercising powers of observation and deduction, without the use of any scientific learning whatsoever. It is a practical question which may be answered by a layman of good sense with as much authority as by a doctor.

22 My conclusion and opinion is that the evidence given by Dr. Easton was not admissible. Further, I am not satisfied that no substantial wrong or miscarriage of justice has been occasioned by the admission of that evidence.

23 I would allow this appeal; the verdict of the jury at the trial before Thompson J. should be set aside and there should be a new trial.

***Aylesworth J.A.* (*Morden* and *McGillivray JJ.A.*, concuring):**

24 The appellant was convicted at Toronto of the murder on or about 10th June 1960, of Margaret "Peggy" Bennett after his trial before Thompson J. and a jury. Numerous grounds of appeal were argued at length on behalf of appellant but all such grounds except two were decided adversely to him during the hearing of the appeal.

25 One of the matters reserved was raised by the Court itself, namely, the sufficiency or insufficiency of the learned trial judge's charge with respect to s. 201(*a*) of the Criminal Code. The other point for consideration is the admissibility of the evidence of Dr. Easton, and if that evidence were admissible, the adequacy of the trial judge's charge thereon.

26 It is not in issue, in fact it was conceded by appellant's counsel at trial, that appellant killed Mrs. Bennett by the infliction of numerous knife wounds. The defence advanced by appellant was his alleged lack of capacity to form the intent to kill or to cause bodily harm that he knew was likely to cause death, and that even if he had that capacity, he in fact did not have the essential intent. This defence was based upon appellant's alleged drunkenness caused by his consumption of beer during the evening before the killing. Upon the evidence, one of two verdicts was open to the jury — murder or manslaughter — and the jury were so charged.

27 At about 9 p.m. on the evening of 9th June 1960, appellant with his wife and two men who boarded with them, Baker and Zackariah, went to the Wembley Hotel on Danforth Avenue. They entered the ladies' beverage room where the men drank some beer. Mrs. Fisher returned home shortly after their arrival at the hotel and the men moved into the men's beverage room. According to Zackariah, appellant had four glasses of beer with him but in the course of the evening visited other tables in other of the beverage rooms where, he assumes, appellant also drank. Baker testified that appellant had a "considerable quantity" of beer. The appellant himself, who gave evidence, swore that he drank between 20 and 25 glasses of beer that evening. Neither he, as a witness, nor any of the other witnesses says that he was drunk. However, in his statement given to the police and admitted in evidence, he says with respect to the actual time of the fatal stabbing, "I really went off my rocker, I guess or I must have been drunk or a combination of both."

28 On 21st June Inspector Morgan and Detective Wright called at the appellant's place of employment and requested him to accompany them to the Scarborough police station, which he did. While at the police station appellant gave the statement later admitted in evidence. The admission of this statement as part of the Crown's case was strenuously opposed by appellant's

counsel at trial but after a *voir dire* it was ruled admissible by the trial judge and we held that it was rightly admitted. The appellant therein gave a detailed account of his meeting with Mrs. Bennett when he left the hotel at closing time, of their conversation wherein she requested him to drive her home, of his walking two or more city blocks to his own home, of his driving his car back to the hotel and of all the subsequent events of that night. He says he picked her up in his car, drove along O'Connor Drive, stopped at a restaurant to buy cigarettes (deceased previously had asked for a cigarette, he said, and there were none in the car) and then continued their drive to Markham Road and back west along Eglinton Avenue. He relates in detail the sexual advances which he says Mrs. Bennett made to him during the drive, their conversation in the car, his stopping for a red traffic light, his driving into a deserted service station lot, the stabbing of the deceased and his pushing her out of the car and driving away. He further relates his searching of his car for belongings of the deceased and of throwing out of the car, one of her shoes and some papers he found in her purse and of arriving home and going to bed.

29 In contrast to his statement, the appellant deposed at trial that the next morning, after finding his bloodstained knife on the seat of his car and some of deceased's belongings, he suspected that he was responsible for the death of the woman whose death he learned of from listening to a radio broadcast. He swore that he had no recollection of anything which might have occurred between 11 p.m. of the evening before the killing and 7.30 a.m. the next morning when he awoke at his home. He also swore that his description of the events detailed in his statement were in part suggested to him by the police and in part suggested to his mind by a drive he had taken with his wife the evening following the killing.

30 The pathologist who performed the autopsy testified that the deceased had 16 stab wounds which in his opinion had been inflicted within a period of one or two minutes. Her death, he said, followed almost immediately the infliction of one of these wounds which punctured the aorta. The deceased had suffered other injuries — a fractured nose, a fractured left cheek-bone and considerable bruising around one eye.

31 I now turn to a consideration of the first of the reserved points I have mentioned, namely, the sufficiency of the learned trial judge's charge with respect to s. 201(*a*) of the Criminal Code.

32 The section reads:

> 201 Culpable homicide is murder
>
> (*a*) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

33 Mr. Pomerant, while conceding that the learned trial judge charged the jury adequately with respect to s. 201(*a*) (i) and the first part of (ii) "means to cause him bodily harm," submitted that he did not sufficiently draw the jury's attention to the necessity of finding knowledge on appellant's part that what he did was likely to cause death. He argued that there were two distinct capacities which the jury should have been invited to consider (a) the capacity to form the intent to cause bodily harm and (b) the capacity to know that it was likely to cause death.

34 The learned trial judge read to the jury s. 201(*a*) and then proceeded to say:

That is, murder may be either the killing of a human being by one who means to cause that death or intends to kill him, or by one who means to cause him bodily harm, or intends to cause him bodily harm, that he knows is likely to cause his death in reckless disregard of the consequences as to whether death ensues or not.

35 Later in his charge in dealing with the defence of drunkenness, he said:

The defence has raised — and, as a matter of fact, the issue must arise in any event from the evidence as you heard it — the issue of drunkenness. There is evidence of drinking here by the accused man. The defence submits to you that the accused man was so drunk as to be unable to form the intent to commit murder. Now, the defence, again let me remind you, does not have to prove that. If there be any doubt in your mind, reasonable doubt in your mind, whether or not that was the case, then, of course, the accused man is entitled to the benefit of that doubt. So that if you are satisfied in the first instance that the accused was so intoxicated, that is, if the effect of the consumption of alcohol which he took upon him was such that he didn't have or was incapable of having and forming the intent to kill or to inflict the necessary bodily harm or secondly if there be any reasonable doubt about that fact, then he is entitled to a verdict of manslaughter, or your verdict should be manslaughter. Because the Crown, of course, must prove capacity beyond a reasonable doubt.

36 Again still later he said:

Now the evidence is voluminous here, but I think you will be able to discard a great deal of it from your minds now, because most of it in the inception or in the early stages of this trial, was directed towards circumstantially proving that the accused was the man who actually killed Peggy Bennett. That is now admitted, and there is no necessity for you now, as I previously said, to rack and torture your brains about that question. But the question as to whether or not he intended to kill her, or whether or not he intended to cause bodily harm which he knew would likely cause her death in reckless disregard of the consequences, is another question and the important issue.

37 After telling the jury that the Crown's contention was that the circumstantial evidence led only to the conclusion that appellant intended to kill Mrs. Bennett, he addressed them as follows:

I have told you that you may draw inferences of fact. Inferences of fact are, of course for you, and all inferences of fact are for you. But if there was nothing in the evidence to suggest otherwise, I would think that the irresistible inference you would draw from the evidence is that a man who stabbed this woman in the manner in which the evidence indicates she was stabbed, and killed her in the manner in which the evidence indicates she was killed, would certainly either have intended to cause her death or have intended to cause her bodily harm which he knew was likely to result in her death, and was reckless as to whether or not it did result in death; and that death would be the consequence.

But as against that, the only issue that I can see, that can arise from the evidence is the issue of drunkenness, or possibly the issue of provocation as I have put it to you. So, you will see how vitally important the issue of drunkenness becomes in this case, and I must deal with that, of course, very fully.

Now, drunkenness, as I have told you does not excuse or exonerate crime, it can only, in the case of culpable homicide, make that manslaughter which would otherwise be murder. Evidence of drunkenness which at the very crucial time, the moment of the alleged offence, no other time but the moment when the offence was committed, or the alleged offence was committed, renders an accused, an accused person incapable of forming the specific intent, that is the intent to kill, or to do that bodily harm I have spoken of as necessary to constitute the crime charged, should be taken into consideration by you with the other facts which appear from the evidence in order to decide whether or not he had that intent.

38 Upon recall of the jury they were further charged:

> The question of intent, or the capacity to form the intent to kill or to cause bodily harm which might result in death, and which should be known to the accused to likely result in death and in reckless disregard of the consequences, is not an ingredient at all of provocation.

39 I am satisfied upon a consideration of his charge as a whole that the learned trial judge made it sufficiently clear to the jury that the intent required to bring his act under s. 201(*a*) (ii) involved knowledge on the part of the accused of the likely consequences of his act and that his charge was fully in accordance with the law as enunciated in *MacAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166, 13 Can. Abr. 1388; *Rex v. Linton*, [1949] O.R. 100, 9 C.R. 262, 93 C.C.C. 97, 3 Abr. Con. (2nd) 255 and *Malanik v. The Queen*, [1952] 2 S.C.R. 335, 14 C.R. 367, 103 C.C.C. 1, 3 Abr. Con. (2nd) 54. It is true that the judge did not emphasize, other than as already quoted from his charge, the necessity of knowledge on the part of the accused. However, it should be pointed out that the Crown went to the jury upon the basis that the only inference the jury could draw from the evidence was that the accused intended to kill Mrs. Bennett. If the jury had entertained a reasonable doubt as to the accused's intent to kill but were satisfied that he intended to cause bodily harm, that they would, in my opinion, have been bound to find, bearing in mind the nature of his attack upon the woman, that he knew the injuries he was inflicting were likely to cause her death. Upon this aspect of the appeal I would not accede to appellant's submissions. There remains the second point upon which we reserved our judgment.

40 Upon the question of the admissibility of the evidence of Dr. Easton, I think it desirable to quote his complete testimony.

> Doctor NORMAN LEWIS EASTON, sworn
>
> **EXAMINATION-IN-CHIEF BY MR. KLEIN:**
>
> Q. Dr. Easton, what is your occupation? A. Psychiatrist.
>
> Q. What are your qualifications? A. I graduated in medicine from the University of Toronto in 1926. I have been practising psychiatry continuously and exclusively since 1930. I have held a specialist certificate in the specialty of psychiatry since 1945, which is recognized across the Dominion.
>
> Q. What position do you hold? A. I am Director of Psychiatry at the Ontario Hospital, New Toronto.
>
> Q. How long have you occupied that? A. I have been there about thirty years.
>
> Q. And have you given evidence in courts? A. For about ten years.
>
> Q. On psychiatric questions? A. That is correct.
>
> Q. Doctor, have you read the statement which according to the evidence was made by the accused, Exhibit 60, which I now show you? Have You? A. I have.
>
> Q. Now, I want to put certain facts to you in the form of a hypothetical question and ask you to assume that the facts are as I state them. And then I want to ask you what your opinion is on those facts, and on the facts, assuming it to be a fact, that the accused made that statement, Exhibit 60, I want to ask you your opinion as to his capacity to form the intent to cause the death of a person, and his capacity to form the intent to cause bodily harm that he knew was likely to cause death.
>
> Well, then, assuming the facts are as follows: That at 8:30 p.m. on Thursday 9th June, last, the accused went to the Wembley Hotel, and between then and 12:15 a.m., 10th June, drank four bottles of beer or more; that he then walked out of the hotel, spoke to a woman; then walked two blocks, got his car, and drove it back to the hotel; picked the woman up, the Wembley Hotel on the Danforth; and then drove to Eglinton Avenue and Midland, a distance of six miles or more; and that

he then stabbed the woman fifteen times, and cut her left breast down one side and across the bottom and up the other side; that the stab wounds, six of them, were in the back, in the region of the left shoulder blade, one of which punctured the aorta, causing death, two of them were in the right elbow, one was on the — a superficial wound was on the right forearm, one was on the right inner leg, above the knee, and that there were three abdominal wounds, left of the medial line — is that what you call it? A. The midline.

Q. The midline. Assuming that those were the wounds, and that her death was caused as I stated; he pushed her out of the car and left her lying on the ground; and then drove the car directly or indirectly back home; and that the stabbing occurred roughly at one o'clock, that is 1:00 a.m.; and then he drove the car back home; and then eleven days later, namely on 21st June, he made this statement to the police which is contained in Exhibit No. 60; now, assuming the facts to be as I have stated them, what is your opinion as to whether or not the accused in stabbing the woman and inflicting those wounds, had the intent — had the capacity, pardon me — had the capacity to form the intent to cause death? A. It is my opinion that he did have the capacity to form the intent.

Q. Could you explain your reasons? A. Well, any man who could do the things that he is alleged to have done, it would require a sufficient degree of coordination and logical thinking to make it possible for him to form an intent to do an act of that kind. He had done so many complicated things previous to that, that if he could have done them I am sure that he would have had the intent — had the capacity — to form the intent at the time.

Q. At the time he inflicted the wounds? A. Yes.

Q. To what things do you refer? A. I refer to driving a car six miles, and walking home to get his car, and coming back to get the girl. I, also, refer to his statements about events that followed it. His attempt to explain behaviour, if one were to believe it, it shows that he is thinking and attempting to, when he is making his statement, to defend himself —

HIS LORDSHIP: No, no, just a moment. That is not proper, what he is attempting to do. You are asked to give the reasons for the opinion why you say he has the capacity and not the reasons he may make some statement. It is not the issue.

MR. KLEIN: Q. Doctor, what do you say as to his capacity to form the intent, this is at the time he inflicted the wounds, his capacity to form the intent to cause bodily harm that he knew is likely to cause death? A. Yes.

Q. Pardon? A. The reasons?

Q. What is your opinion as to whether or not he had such capacity? A. I think he did have the capacity.

Q. Yes. And on what reasons do you base your opinion? A. Just about the same reasons I gave for the other.

MR. KLEIN: Thank you. Your witness.

Cross-Examination By Mr. Pomerant:

41

Q. Doctor, you are basing your opinion on the hypothetical fact situation my friend has put to you? A. That is correct.

Q. Now, my friend asked you in proposing the facts upon which you were going to base your answer to his hypothetical question, stated that the accused went to the hotel and then drank four bottles of beer or more. Now, how much alcohol in this hypothetical case that you now have in your mind are you assuming that this man might have drank, this hypothetical man? A. I don't know how much alcohol the man did drink.

HIS LORDSHIP: You are not being asked that, you are being asked how much alcohol are you assuming in coming to an opinion? The hypothetical facts put to you were four bottles of beer or more. Now, surely there must be some stage, if he had more than four bottles, at which your mind, your opinion, would be influenced by his capacity or lack of capacity. That

is what counsel is putting to you, how much beer or alcohol you are assuming he did have in forming your opinion, which is a perfectly proper question.

THE WITNESS: Well, it is my opinion that a person could drink up to 25 bottles of beer over the course of an evening, which would be from eight —

HIS LORDSHIP: That is not what you are being asked. You are being asked as to the facts in this case, not what someone might do over the course of an evening. The hypothetical facts put to you, how much alcohol are you assuming in coming to the opinion that this man consumed? A. Twenty-five bottles.

MR. POMERANT: Q. So, the twenty-five bottles of beer, it is your opinion in this hypothetical question that has been put to you, this man under the circumstances would be able to have the capacity to form the intent? A. Yes, that is correct.

HIS LORDSHIP: Form the intent, he says, to cause death or in the alternative, and in the alternative to cause bodily harm which he knew would likely result in death. A. Yes.

MR. POMERANT: Q. Of course, Doctor, you do not know what capacity this man actually did have at that time? A. I don't.

Q. What you are suggesting now is a theory of yours? A. That is correct.

MR. POMERANT: That is all, Doctor.

MR. KLEIN: Thank you, Doctor. That is the case for the Crown, my lord.

HIS LORDSHIP: Just a moment, I am a little puzzled about this myself. It is an important question and I would like to know just what factors you are taking into consideration when you form the opinion as to capacity.

Q. For instance, let me put this to you, are you taking into consideration the capability of foreseeing the consequences of his conduct or his act, and perceiving the full force of his act? A. Yes.

Q. You are? A. Yes.

HIS LORDSHIP: Have counsel any further questions arising out of that?

MR. POMERANT: Oh, no, my lord. No, my lord.

HIS LORDSHIP: Have you, Mr. Klein?

MR. KLEIN: The only question would be, what was the question? I am afraid that was a little complicated.

HIS LORDSHIP: Perhaps I was going too fast for you, Mr. Klein.

MR. KLEIN: Yes, my lord.

HIS LORDSHIP: Mr. Reporter, would you read the last question?

THE COURT REPORTER: (Reading):

> HIS LORDSHIP: Just a moment, I am a little puzzled about this myself. It is an important question and I would like to know just what factors you are taking into consideration, when you form the opinion as to capacity.
>
> Q. For instance, let me put this to you, are you taking into consideration the capability of foreseeing the consequences of his conduct or his act, and perceiving the full force of his act? A. Yes.

MR. KLEIN: Thank you, my lord. I have no more questions.

42 Counsel for appellant submitted that this evidence was inadmissible (1) because the witness gave his opinion on the very issue which the jury had to decide: (2) the witness had never conducted a medical examination of the appellant: (3) the witness based his opinion upon his evaluation of the evidence he had heard and (4) that his evidence was not upon a matter calling for expert opinion.

43 In the reported decisions various reasons have been given for the exclusion of particular opinion evidence. It is trite to say that a witness may not give his opinion upon matters calling for special skill or knowledge unless he is an expert in such matters nor will an expert witness be allowed to give his opinion upon matters not within his particular field. Finally, opinion evidence may not be given upon a subject-matter within what may be described as the common stock of knowledge. Subject to these rules, the basic reasoning which runs through the authorities here and in England, seems to be that expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it. When the latter is the situation, the intended opinion evidence is superfluous and its admission would only involve an unnecessary addition to the testimony placed before the jury. Over 60 years ago Thayer in his Preliminary Treatise On Evidence At Common Law wrote (at p. 525):

> There is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where in the judgment of the court, it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule.

44 In some cases where opinion evidence has been rejected, the ground given is that the giving of the witness's opinion usurped the function of the jury. In other decisions it is said that the evidence tendered constituted an opinion upon the very point or issue which the jury had to decide. An examination of these authorities, however, discloses, in my view, that the jury or the judge, in cases tried without a jury, would have had no difficulty in arriving at a proper conclusion in the absence of the tendered opinion and that this was the true ground for its rejection.

45 In many instances opinion evidence is received upon the very issue the Court has to decide, as for example, where the issue is the materiality of a representation in an application for insurance: *Yorke v. Yorkshire Insurance Co.*, [1918] 1 K.B. 662; *Sun Insurance Office v. Roy*, [1927] S.C.R. 8 at 13, [1927] 1 D.L.R. 17, 23 Can. Abr. 340; or where the issue in a marine case is proper seamanship: *Fenwick v. Bell* (1844), 1 C. & K. 312, 174 E.R. 825, or in malpractice actions against professional men: *Davy v. Morrison*, [1932] O.R. 1 at 9, [1931] 4 D.L.R. 619, 26 Can. Abr. 925. In *Rex v. Mason* (1911), 7 Cr. App. R. 67, the defence to a charge of murder was that the deceased had committed suicide and a doctor who had heard the evidence was asked whether it was his opinion that the fatal wound was inflicted by someone other than the deceased. The Court of Criminal Appeal held that his answer was admissible as an opinion based on an assumed state of facts. In *Rex v. Holmes*, [1953] 2 All E.R. 324, the same Court decided that a doctor called in support of the accused's plea of insanity might be asked in cross-examination whether the prisoner's conduct after the crime, indicated that he knew the nature of his act and that it was wrong, although these are, of course, the very points which determine the applicability of the rules in *McNaghten's* case. The decision in the *Holmes* case has been approved in the British Columbia Court of Appeal in *Regina v. Mathews* (1953), 17 C.R. 241, 9 W.W.R. (N.S.) 650, 3 Abr. Con. (2nd) 53. There are numerous other examples of the admission of opinion evidence upon the very point in issue, among which reference may be had to *Rex v. Searle* (1831), 1 M. & Rob. 75, 174 E.R. 26; *Regina v. Frances* (1849), 4 Cox C.C. 57; *Rex v. Smith*, 31 T.L.R. 617; *Rex v. Rivett* (1950), 34 Cr. App. R. 87.

46 Where the opinion tendered, involves what is a mixed question of law and fact, the opinion is not admissible. Thus, a medical man may not be allowed in terms to give his opinion that an accused was a criminal sexual psychopath, for inherent in that status is a difficult legal concept: *Regina v. Neil*, [1957] S.C.R. 685, 26 C.R. 281, 119 C.C.C. 1, 11 D.L.R. (2d) 545, 1957

Can. Abr. 274, 356. What then was the nature of the opinion given by Dr. Easton and in what circumstances was it given?

47 Appellant's defence, in its initial aspect, was that he lacked the capacity to form the necessary intent to kill or to cause the requisite bodily harm because of his consumption of beer. This theory of the defence had become manifest in the course of defence counsel's cross-examination of the Crown witnesses Zackariah and Baker; counsel questioned them closely on their knowledge of appellant's drinking habits generally and as to the amount of beer appellant had consumed on the evening of 9th June; it was therefore abundantly clear before Dr. Easton was called to the box that, as defence counsel subsequently expressed it in his address to the jury, "drunkenness — is the key to this case" and that in very large measure the verdict of the jury as to murder on the one hand or manslaughter on the other, would turn directly upon the discharge or the failure of discharge of the onus upon the Crown to prove appellant's capacity to form the required intent. The question of appellant's capacity, of course, was for the jury, as was the question of his actual intent. These are questions of fact and not questions of mixed law and fact. Of the two, Dr. Easton's opinion was directed solely to the issue of capacity. He, apparently, in common with most of the witnesses, was excluded from the court room until summoned to the witness box. The only exceptions to such exclusion seems to have been Police Inspector Payne for the Crown and for the defence, Dr. Turner, apparently a medical expert, who in the words of appellant's counsel, remained in the court room "for instructions." Dr. Easton gave his opinion upon a statement of hypothetical facts, the truth of which he was asked to assume. The hypothesis may be described as actions of appellant upon the night in question according to appellant's own detailed statement and the fact of the giving of that statement. The hypothetical facts were set out for the doctor in the questions addressed to him by Crown counsel. He was not, therefore, "evaluating the evidence" in framing his answer. He was, of course, assuming the facts given to him as an hypothesis to be true, giving his opinion upon one of the vital issues to be decided by the jury, but that does not *per se* render his opinion inadmissible. Dr. Easton is a qualified and experienced psychiatrist. Psychiatry is a comparatively modern and special branch of medical science which deals with the study of the mind, the working of the mind, the mental state of an individual as demonstrated by his conversation, attitude and actions. I entertain no doubt that Dr. Easton as a specialist in psychiatry for many years and with the experience which his position entails, is qualified to express an opinion upon the mental capacity of an individual such as appellant to form a certain intent, taking as true an adequate description of the relevant behaviour of that individual and that not only is the subject-matter of that opinion sufficiently within the field of the expert but that the opinion would be of assistance to the jury. The gist of his opinion, I think, may fairly be said to be that, regardless of what quantity of beer appellant actually may have consumed upon the evening in question, appellant's actions, as put to the doctor, were such as to portray a capacity to form the intent to kill. The relation of appellant's actions and conduct, as posed to the doctor, to appellant's mental capacity, was surely a matter upon which the witness could call into play his special knowledge in that field. The fact that the witness did not examine the appellant, in my opinion, can have no bearing upon the question of the admissibility of his evidence; the whole basis of his evidence, as has been said already, was the effect of appellant's activities as demonstrating to an expert in the field of psychiatry, the presence or absence of a specific degree of mental capacity. While the value of that evidence was for the jury, it was, in my view, admissible evidence.

48 Finally, it is also my view that the learned trial judge dealt fully, fairly and accurately with the doctor's evidence in his charge to the jury. He stressed to them the importance of finding as true, the facts posed hypothetically to the doctor before they were to give any weight to his opinion evidence; they were told that even if they found as true, the facts upon which it was based, they could reject it as they could any other evidence in the case. I quote in part from his charge:

> The value of it, of course, the opinion of experts, is this: In matters which are technical, for instance as to mental capacity, we as laymen are not as proficient as those who have made careful studies of it and who treat mental diseases. You may accept part of the opinion and you may reject part of it. You may accept all of it or reject all of it. You may deal with it the same as you would any other direct evidence.

49 I am unable to accept appellant's argument that in this passage the learned trial judge exaggerated the value of Dr. Easton's evidence or in effect told the jury that they should act upon it.

50 I would dismiss the appeal.

Appeal dismissed, Porter C.J.O. and Laidlaw J.A., dissenting.

End of Document

1996 CarswellSask 440

Saskatchewan Court of Queen's Bench

Daum v. Schroeder

1996 CarswellSask 440, [1996] 8 W.W.R. 432, [1996] S.J. No. 406, 146 Sask. R. 142, 50 C.P.C. (3d) 367, 64 A.C.W.S. (3d) 807

Charlene (Redekopp) Daum (Plaintiff) and David Schroeder and Jaclyn Smith (Defendants)

Klebuc J.

Judgment: July 11, 1996
Docket: Saskatoon Q.B. 1106/90

Counsel: *D.S. Tapp* and *H.L. Nord*, for plaintiff.
R.J. Gibbings, for defendants.

Subject: Civil Practice and Procedure; Evidence

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Evidence --- Documentary evidence — Public documents — General

Evidence — Documentary evidence — Public documents — General — Defendants contesting admissibility of survey prepared by government department — Court declaring survey admissible — Survey meeting requirements for public documents exception to hearsay rule — Statistics Act, S.C. 1970-71-72, c. 15.

Evidence --- Application of Evidence Acts

Evidence — Application of Evidence Acts — Defendants contesting admissibility of survey prepared by government department — Court declaring survey admissible — Survey meeting requirements of Evidence Act — Saskatchewan Evidence Act, R.S.S. 1978, c. S-16, s. 12.

Evidence --- Legal proof — Judicial notice — Miscellaneous issues

Evidence — Legal proof — Judicial notice — Miscellaneous issues — Defendants contesting admissibility of survey prepared by government department — Court declaring survey admissible — Court taking judicial notice of social fact evidence without expert evidence.

During trial, the plaintiff presented as evidence a survey compiled from statistical data prepared by a government department. The defendants applied to have the survey declared inadmissible in the absence of expert testimony confirming its validity.

Held:

Application dismissed.

The rule against hearsay prohibits documents being tendered as proof of the truth of their contents unless a witness having personal knowledge of the document's contents or an expert testifies to the document's validity. However, to avoid the necessity and related inconvenience of public officials testifying to the competency of documents in their control which are inherently reliable, the common law developed an exception to the hearsay rule for material described as public documents. First, the document must have a public objective or purpose. Secondly, the document must be permanently retained and be open to public scrutiny. Surveys and other social science research data are not rendered inadmissible solely because they are based in part upon data and other material that is not available for public inspection due to their confidential or personal nature. The fundamental test is whether the document would be intrinsically less reliable than those where the public has full access. Thirdly, the document must be prepared by an official in the discharge of a public duty. Finally, in some circumstances, an inquiry as to the truth of the facts and conclusions recorded in the document may be required. In the present case, the survey had an obvious public objective and was open to public access. The survey was prepared under a public duty, that being the *Statistics Act*, which authorized the department to collect, compile, analyze, abstract and publish material relating to the conditions of people. The Act also provides for penalties for anyone who answers questions falsely on a survey. An inquiry as to the truth of facts and conclusions recorded in the survey was not necessary because a public official had a duty to collect the survey data and those providing the data had a duty to be truthful or face sanctions.

Section 12 of the *Evidence Act* prescribes three requirements to be met before a document may be received in evidence. First, the original must be a grant, letter or public or official document belonging to or deposited with a government department. Secondly, the officer or person having custody of the original of the document tendered in evidence must

certify that the tendered copy is a true copy of the original. Finally, the original of such copy must otherwise be receivable in evidence. The document must either meet the general criteria for the admissibility of public documents at common law or be admissible pursuant to a statutory provision. Where the requirements of s. 12 of the Act are met, the document will be received as prima facie proof of its contents. Here, the survey met the requirements of s. 12 and was receivable as prima facie evidence of its contents.

Broad social facts can be recognized under the doctrine of judicial notice without an expert first testifying to the validity of the research. Here, the survey was admissible as social fact evidence without the aid of expert evidence because of certain unique circumstances. First, the defendants never questioned the general applicability of the survey or expressed a need to cross-examine the creator of the survey or an expert as to its validity or applicability to the plaintiff's claim. Secondly, experts testifying in similar actions have relied on the survey, or earlier versions of it. Finally, the data contained in the survey did not enhance or corroborate the plaintiff's claim, and was of greater value to the defendants.

Table of Authorities

Cases considered:

Adams Estate v. Decock Estate, [1987] 5 W.W.R. 148, 49 Man. R. (2d) 261 (Q.B.) — *considered*

Cronk v. Canadian General Insurance Co. (1995), 14 C.C.E.L. (2d) 1, 95 C.L.L.C. 210-038, 128 D.L.R. (4th) 147, 85 O.A.C. 54, 23 B.L.R. (2d) 70, 25 O.R. (3d) 505 (C.A.) — *applied*

Finestone v. R., 17 C.R. 211, [1953] 2 S.C.R. 107 — *referred to*

Knoblauch v. Biwer Estate, [1992] 5 W.W.R. 725, (sub nom. *Knoblauch v. Biwer*) 104 Sask. R. 31 (Q.B.) — *referred to*

MacKay v. Manitoba, [1989] 6 W.W.R. 351, 99 N.R. 116, 61 D.L.R. (4th) 385, [1989] 2 S.C.R. 357, 61 Man. R. (2d) 270, 43 C.R.R. 1 — *considered*

Moge v. Moge (1992), [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1, 81 Man. R. (2d) 161, 30 W.A.C. 161, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 — *applied*

Niego v. Lake, [1986] N.W.T.J. 23, Marshall J. (N.W.T. S.C.) — *considered*

Nowlan v. Elderkin, [1950] 3 D.L.R. 773 (N.S. T.D.) — *referred to*

Porter v. R. (1964), 50 M.P.R. 139, [1965] 2 C.C.C. 294, 48 D.L.R. (2d) 277 (N.S. C.A.) — *referred to*

Puczka, Re (1973), 38 D.L.R. (3d) 234 (Sask. Q.B.) — *referred to*

R. v. Aickles (1785), 168 E.R. 297, 1 Leach 390 — *considered*

R. v. Clapham (1829), 4 C. & P. 29 — *referred to*

R. v. Coates (1981), 15 M.V.R. 70, 13 Sask. R. 242 (Q.B.) — *referred to*

R. v. Halpin, [1975] Q.B. 907, [1975] 2 All E.R. 1124, 61 Cr. App. Rep. 97 — *considered*

R. v. Kaipianinen (1953), 17 C.R. 388, [1954] O.R. 43, 107 C.C.C. 377 (C.A.) — *referred to*

R. v. Northern Electric Co., [1955] O.R. 431, 21 C.R. 45, 111 C.C.C. 241, [1955] 3 D.L.R. 449, 24 C.P.R. 1 (H.C.) —

not followed

R. v. O'Brien (1977), [1978] 1 S.C.R. 591, [1977] 5 W.W.R. 400, 38 C.R.N.S. 325, 35 C.C.C. (2d) 209, 16 N.R. 271, 76 D.L.R. (3d) 513 — *applied*

R. v. Pacific Bedding Co. (1949), 8 C.R. 357, [1949] 2 W.W.R. 575, 95 C.C.C. 249 (B.C. C.A.) — *referred to*

Sturla v. Freccia (1880), 5 App. Cas. 623 (H.L.) — *considered*

Thrasyvoulos Ioanno v. Papa Christoforos Demetriou, [1952] 1 All E.R. 179, [1952] A.C. 84 (P.C.) — *considered*

Walker v. Wingfield (1812), 18 Ves. 443, 34 E.R. 384 — *referred to*

Willick v. Willick, 6 R.F.L. (4th) 161, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670 — *applied*

Statutes considered:

Canada Evidence Act, R.S.C. 1985, c. C-5

s. 24*referred to*

s. 25*referred to*

Saskatchewan Evidence Act, R.S.S. 1978, c. S-16

s. 12*considered*

s. 18*considered*

Statistics Act, S.C. 1970-71-72, c. 15 — *considered*

Vehicles Act, R.S.S. 1978, c. V-3 — *referred to*

Rules considered:

Saskatchewan, The Queen's Bench Rules — *referred to*

Application by defendants to declare government survey inadmissible as evidence at trial.

Klebuc J.:

1 During the trial, Ms. Redekopp proffered as evidence, statistical data prepared by Statistics Canada entitled: *General Social Survey Analysis Series: Where does time go?*, Catalogue No. 11-612E, No. 4 ("Survey"). The defendants contested its admissibility in the absence of expert testimony confirming its validity. I accepted the Survey as evidence of its contents and gave the defendants leave to challenge the Survey in whatever manner they might choose, including calling experts.

2 During argument both counsel suggested that the principles governing the admission of documentary evidence similar to the Survey are uncertain and unevenly applied. In response to concerns, I undertook to provide brief reasons dealing with the acceptance of the Survey and similar forms of social science research, and data in damage actions.

3 The rule against hearsay prohibits documents being tendered as proof of the truth of their contents unless a witness having personal knowledge of the document's contents or an expert testifies to the validity thereof. The Supreme Court of Canada in *R. v. O'Brien* (1977), [1978] 1 S.C.R. 591 [[1977] 5 W.W.R. 400], at p. 593 stated the rule thus:

> It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. ...

4 Over time, exceptions to the hearsay rule evolved to meet specific needs and otherwise to simplify the administration of justice. Of the many exceptions (some of which are statutory) the following pertain to the issues before me:

(1) The public document exception at common law;

(2) *The Saskatchewan Evidence Act* exception; and

(3) The doctrine of judicial notice.

(1) Public Document Exception at Common Law

5 To avoid the necessity and related inconvenience of public officials testifying to the competency of documents in their control which are inherently reliable, the common law developed an exception to the hearsay rule for material described as "public documents". Mr. Justice Marshall traced the historical development of this exception in *Niego v. Lake*, [1986] N.W.T.J. No. 23 (S.C., unreported). I quote it at length:

> The common law exception to the rule against hearsay for public documents has a notable history. ... Its beginning is coeval with the common law, coming as it does first from the time of the Domesday book, and changing and adopting, till it reaches us in its present form today.
>
> . . . . .
>
> ... William, the Conqueror, as every western school child knows, took by force all of England in 1066. He was, by all accounts, an excellent administrator of his kingdoms, and so in the closing days of his reign he ordered the compilation of the now famous Domesday Book. This record or inquisition, actually 2 volumes now housed in the Office of Public Records in London, was a great survey of the realm. Landowners, their tenants and subtenants, the land they held, the stock they kept, were all written down in this great "Record." The purpose of this first record — and this is the foundation of the word "record" so often used in the common law — was not legal, in the pure sense, but rather administrative. It was to settle the taxable resources of all England, and it did.
>
> So respected an authority was this Record in the country, in the feudal courts extant at that time, that from then on and through to the middle ages this "Record" was quoted and accepted in all the courts for the truth of the information it contained. So began the practice of admitting public "records" in English courts.
>
> . . . . .
>
> First, the rolls of the Exchequer and then the courts of law thus were accorded this status of official record. The records accepted were thus first financial as in Domesday, but such administrative records of tenure and subtenure and feudal incidents became less important when the Writ of Right was abolished and limitation periods were set. Judicial records

> then became more often the official public records admitted as proof. Next, following this began the great growths in government and the rule again adapted to take account of this change. So purely administrative documents of a public nature came to be accepted as well. [Footnote: See generally, Plucknett, A Concise History of the Common Law, 5th ed., Butterworths & Co., London, 1956; see also Wigmore, Chadbourn Revision, Vol. V. p. 617.]

6 Over time, the courts developed general criteria to govern the admission of documents under the common law exception for public documents. The genesis of the criteria is found in *Sturla v. Freccia* (1880), 5 App. Cas. 623 (H.L.), where Lord Blackburn, at p. 643 described the essential characteristics of a "public document" as follows:

> Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. ... But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi*-judicial.

7 The Court of Appeal in *Thrasyvoulos Ionnou v. Papa Christoforos Demetriou*, [1952] A.C. 84 (H.L.), expanded the requirements provided in *Sturla* by holding that documents tendered pursuant to the exception must be connected to matters that the public officer had a duty to deal with. Similar reasoning was applied in *Finestone v. R.*, [1953] S.C.R. 107; *R. v. Kaipiainen* (1953), 107 C.C.C. 377 (Ont. C.A.); *R. v. Northern Electric* (1955), 111 C.C.C. 241 (Ont. H.C.); and *R. v. Coates* (1981), 13 Sask. R. 242 (Q.B.); *Puczka, Re*, [1973] 38 D.L.R. (3d) 234 at 239-42 (Sask. Q.B.); and *R. v. Halpin*, [1975] 2 All E.R. 1124 (C.A.).

8 The essential character of the exception is also reviewed in *Wigmore on Evidence*, (3d) Little Brown and Company, Boston; *Law of Evidence Canada* by Sopinka J., S. Lederman and A. Bryant (Toronto: Butterworths, 1992); *Documentary Evidence in Canada* by J. Douglas Ewart, Michael Lomer and Jeff Casey (Carswell Legal Publications, 1984). I concluded from the primary and secondary authorities cited that the current general criteria for the admission of documentary evidence under the common law exception consist of the following:

> (1) The document must have a public objective or purpose;
>
> (2) The document must be permanently retained and open for inspection by persons having an interest in its subject matter;
>
> (3) It must have been prepared pursuant to a public duty;
>
> (4) In some circumstances, an inquiry as to the truth of the facts and conclusions recorded in the public document may be required.

9 Additional criteria have been developed for use in conjunction with specific documents or circumstances. In the instant case, it is not necessary nor possible to consider the range of conditions that may apply beyond or in place of the general criteria. Special requirements applicable to the admission of business records, including hospital records, under the common law exception are discussed by Ewart at pp. 48-61. I now turn to the criterion noted.

First Criterion - the document must have a public objective or purpose.

10 Documents created pursuant to a public authority regarding matters of public interest generally meet this criterion. Public registers, official certificates and works of reference are well-accepted examples of the same. Conversely, documents of a private nature and material prepared by a government agency, a public body or a public official for internal use or with the intent that the same will remain confidential, do not meet this criterion although properly certified and of record with a department of the Government of Canada, or a province or territory thereof. The requisite intention is often obvious upon an examination of the document or the legislation, regulation or common law duty governing its creation or retention. Where the requisite intention is not obvious, the propounder must call evidence to prove the same. The burden is not an onerous one for public interest has been interpreted generously. See *Nowlan v. Elderkin*, [1950] 3 D.L.R. 773 (N.S. T.D.).

11 In the instant case, the Survey meets the first criterion for it has an obvious public objective.

Second Criterion - the document must be permanently retained and be open to public inspection.

12 The requirement of public access is a primary condition for the acceptance of a document under English common law exception. In the United States, lack of public access does not render a document inadmissible but may impact on its evidentiary value. The significance of public access in Canada remains uncertain. The English approach was followed in *R. v. Kaipiainen, supra; R. v. Pacific Bedding Co.*, [1949] 2 W.W.R. 575 (B.C. C.A.); *R. v. Northern Electric, supra; Porter v. R.* (1964), 48 D.L.R. (2d) 277 (N.S. C.A); and *Adams Estate v. Decock Estate*, [1987] 5 W.W.R. 148 (Man. Q.B.). An approach similar to the American approach was applied in *Nowlan v. Elderkin, supra*, and in *Finestone v. R., supra*, although the latter is somewhat ambiguous.

13 Chief Justice McRuer in *Northern Electric, supra*, took the English approach a step further by holding that the criterion of public access not only embodied the implied right of the public to examine the document but also to challenge its contents. There, he held a statistical report prepared by the Dominion Bureau of Statistics to be inadmissible because the data used in compiling the report was not open for public inspection and criticism. In that respect his decision conflicts with *Wigmore on Evidence* which at s. 1671, p. 685, suggests that a census and similar inquiries as to population, manufacturing, agriculture, wealth and other sociological data made under an expressed legislative warrant and authority, meet all of the criteria for admission as a public document. At p. 280 McRuer C.J.H.C. discusses his disagreement with Wigmore:

> In view of all the authorities, it is difficult to decide whether Parliament in leaving the admissibility of the reports of the Dominion Bureau of Statistics to the common law assumed that they are admissible at common law, as contended by Wigmore, or whether the failure of Parliament to pass specific legislation either in England or in Canada indicates that it is contrary to the public interest that they should be admitted as *prima facie* evidence. They stand on a very different footing from a record of the registration of events or facts, whether they be births, marriages, deaths or climatic conditions. *They are a summation of the results of inquiries made pursuant to public duty. Although they are made for the use of the public, they can gain little or no authority by reason of the public or any member of the public being in a position to challenge or dispute them, because the constituent material that goes to make up the reports is secret.* ... My decision, after the fullest consideration, is that the reports are not admissible. (emphasis added)

The Manitoba Court of Queen's Bench in *Adams Estate v. Decock Estate, supra*, questioned whether the criterion of publicity is still applicable as far as it relates to day to day records kept on file in a government office.

14 In my opinion, reports, surveys, census reports and social science research data are not rendered inadmissible under the common law exception solely because they are based in part upon data and other material that is not available for public inspection due to their confidential or personal nature, or because disclosure thereof is prohibited by law — e.g. reports to the

Department of Health with respect to the health of a particular person, census returns provided to the Government of Canada, and responses to inquiries by Statistics Canada. The fundamental test in my opinion is whether the document would be intrinsically less reliable than those where the public has full access. Where a creditable doubt is raised, the secrecy or unavailability of data relied on in a document should only affect the weight or value of the document, not its admissibility. *Northern Electric*, in my opinion, should not be the law in Saskatchewan. Since the public has access to the Survey, I only needed to consider whether denial of public access to the Survey's constituent material was fatal to its qualification under the common law exception.

15 The Survey clearly explains the procedures followed by Statistics Canada in obtaining and compiling data, including particulars as to the number of persons who provided the data and the nature of the information sought from those providers. Full disclosure of the data collected, in my opinion, would not add creditability to the Survey. Hence, the Survey meets the second criterion.

Third Criterion - document prepared pursuant to a public duty.

16 It has long been held that for a document to qualify as a public document, it must have been made by an official in the discharge of a public duty. See *Sturla v. Freccia, supra; Northern Electric, supra; Adams Estate, supra*; and *R. v. Coates, supra*. The requisite public duty may arise pursuant to a statutory or common law obligation. Thus a private individual may qualify as a "public official" where a duty or obligation is imposed on her or him to report on specific activities.

17 While there is little disagreement who qualifies a public official, the requirement that the official must have a duty or obligation to prepare the report proffered as evidence before the same may be received under the common law exception was questioned by Marshall J. in *Niego v. Lake, supra*. There he accepted in evidence reports printed by a department of the territorial government notwithstanding that they were not produced pursuant to an expressed or implied authority or obligation on the part of the official who created them. In arriving at his judgment, Marshall J. relied on *R. v. Aickles* (1785), 1 Leach 390, 168 E.R. 297, and quoted therefrom at p. 298:

> ... the law reposes such a confidence in public officers, that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence, and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. ... In the present case Mr. N. has no private interest whatsoever in this book, to induce him to make factitious entries in it. He is a public officer recording a public transaction. ...

He then set out the basis for his ruling:

> The makers of these reports in Canada would, I think, generally be accepted by trustworthy, honest and careful public servants. They are also accepted as being independent in regard to the parties that may come before the court with the surveys or reports. The surveys, because of this independence, are further acceptable because the documents are in all senses public, produced by the government for the public and open to the public scrutiny and criticism. That is the rationale, and it should, in theory and practice, support the rule.
>
> The rule then should require that expediency be shown, that the document is produced for the public use by the government. The report should be open to public scrutiny throughout and be of a public nature. *I see no reason for express statutory authority for its production in the context of modern government, or indeed that the inquiry be judicial or semi-judicial in any sense.* (Emphasis added, footnotes omitted)

18 In my view, the acceptance as evidence of any document created, other than pursuant to a statutory or common law duty, should not be received under the common law exception for the following reasons. First, when public officials produce documents pursuant to a direct duty, their ability to prepare or take charge of such documents may be inferred. Similar competence should not be inferred where public officials deal with subjects beyond the scope of their authority. Therefore, out-of-scope or unauthorized reports and records should receive no greater recognition than that afforded to similar documents prepared by independent and honest private citizens. Secondly, where documents are created pursuant to a duty or authority, established procedures usually exist to which the opposing party may refer when assessing the proffered document. It is not reasonable to infer that similar procedures exist for the creation of "unofficial" reports and records. Thirdly, the exception to the hearsay rule was created for the convenience of public officers, the courts and litigants generally. Often the inconvenience to a litigant confronted with unofficial records will be materially greater than the inconvenience occasioned by requiring public officials to testify in respect to such records.

19 While counsel for Ms. Redekopp produced no evidence of a common law or statutory duty or authority for Statistics Canada to compile the Survey, I am satisfied on a post-trial review of the legislation and regulations governing the operations of Statistics Canada that the requisite duty exists at two levels. First, the *Statistics Act*, 1970-71-72, c. 15, authorizes Statistics Canada to collect, compile, analyse, abstract and publish material relating to conditions of people. Second, the *Statistics Act* provides that anyone who, *inter alia*, answers falsely any question posed by Statistics Canada concerning a proper subject is guilty of a summary conviction offence. In *R. v. Halpin*, the Court of Appeal received records of the registrar for corporations as *prima facie* that the accused had been a director of a corporation involved in alleged acts of fraud. At p. 1128 Geoffrey Lane L.J. describes the evolution of the common law exception to meet current needs:

> ... The common law as expressed in the earlier cases which have been cited were plainly designed to apply to an uncomplicated community where those charged with keeping registers would, more often than not, be personally acquainted with the people whose affairs they were recording and the vicar, as already indicated, would probably himself have officiated at the baptism, marriage or burial which he later recorded in the presence of the churchwardens on the register before putting it back in the coffers. *But the common law should move with the times and should recognise the fact that the official charged with recording matters of public import can no longer in this highly complicated world, as like as not, have personal knowledge of their accuracy.*
>
> What has happened now is that the function originally performed by one man has had to be shared between two: the first having the knowledge and the statutory duty to record that knowledge and forward it to the registrar, the second having the duty to preserve that document and to show it to members of the public under proper conditions as required.
>
> Where a duty is cast on a limited company by statute to make accurate returns of company matters to the registrar, so that those returns can be filed and inspected by members of the public, the necessary conditions, in the judgment of this court, have been fulfilled for that documents to be admissible. All statements on the return are admissible as prima facie proof of the truth of their contents. (emphasis added)

The court further concluded that untimeliness in the filing of a report with the registrar of companies did not affect the admissibility of records based thereon, but might affect the weight to be given thereto.

Fourth Criterion - inquiry as to truth of facts and other material.

20 The requirement of an inquiry does not apply to situations where a public officer has a duty to maintain records or collect data and where other persons involved in the process have a legal obligation to be truthful coupled with sanctions should they breach the same. See *R. v. Halpin*. As previously noted, the requisite duties exist with respect to the Survey. Therefore, I need not address the broader question of whether some form of inquiry should continue to be a fundamental requirement in other circumstances, or whether the degree and manner of inquiry should only affect the weight to be given to a document proffered as evidence.

The Evidence Act Exemption

21 *The Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16 (the "Act") initially codified the common law rules for the acceptance of documentary evidence and remedied some of its shortfalls. Over time its provisions were expanded to include the acceptance of records and reports without the aid of *viva voce* evidence, all with the objective of accommodating litigants, public officials and the courts. In the instant case, only ss. 12 and 18 [ss. 24 and 25 of the *Canada Evidence Act*] are relevant. They provide:

> 12. In every case in which the original record could be received in evidence, a copy of a grant, map, plan, report, letter or of any official or public document belonging to or deposited in a department of the Government of Canada, of this province or of any province or territory of Canada, purporting to be certified under the hand of any officer or person in whose custody the grant, map, plan, report, letter or official or public document is placed, ... shall be received in evidence without proof of the seal of the corporation or of the signature or of the official character of the person or persons appearing to have signed the same and without further proof thereof.
>
> . . . . .
>
> 18. Where a book or document is of so public a nature as to be admissible in evidence on its mere production from the proper custody and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice or before a person having by law or by consent of parties authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

22 Ms. Redekopp relied on the Act without citing a specific section. Thus, consideration must be given to the alternatives, being ss. 12 and 18.

23 Section 12 prescribes three requirements to be met before a document may be received in evidence, namely:

> (1) The original must be a grant ... letter or public or official document belonging to or deposited with a department of the Government of Canada or a province or territory thereof;
>
> (2) The officer or person having custody of the original of the document tendered in evidence must certify that the tendered copy is a true copy of the original;
>
> (3) The original of such copy must *otherwise be receivable in evidence*. (emphasis added)

The phrase "otherwise receivable in evidence" in s. 12 refers to documents which either meet the general criteria for the admissibility of "public documents" at common law or are admissible pursuant to a statutory provision. Where the requirements of s. 12 are met, the proffered document will be received as *prima facie* proof of its contents but not otherwise: *R. v. O'Brien, supra*. The onus rests with the propounder to establish that the proffered document meets the common law criteria, or to identify other legislation authorizing its admission — e.g., *The Vehicles Act*, R.S.S. 1978, c. V-3.

24 Subject to proper certification the Survey meets the requirements of s. 12 and thus is receivable as *prima facie* evidence of its contents. The deficiency being of minor nature and readily curable, I received the Survey in evidence.

25 Section 18 is of broader application than s. 12 because its application is not limited to official or public documents of the Government of Canada or of a province or territory thereof. Church records of birth, baptisms and death when certified by the priest, minister or other church official having custody thereof pursuant to a duty may fall into this category. See *Walker v. Wingfield* (1812), 18 Ves. 443 at 447. In *R. v. Clapham* (1829), 4 C. & P. 29, wherein a baptismal certificate was held admissible with respect to the question of baptism, but not as to the question of birth date.

26 Ewart at pp. 204-5 notes:

> Section 25 [s.18 of the Act] was enacted in 1893, at a time when there were fewer statutory provisions providing for the admissibility of copies of documents. With the enactment of each new section on documentary evidence the applicability of this section diminished. It is submitted that the only real applicability of this section is in relation to the common law document exception. Since this exception is also covered by section 24(a) [s. 12 of the Act], and that section does not require that the document be "so public a nature as to be admissible in evidence on its mere production", it is submitted that practically speaking section 25 is redundant. In practice, this section has been resorted to very infrequently.

The Survey is not of such a public nature that I may take judicial notice of it. Thus, in the absence of direct evidence of the public's awareness and acceptance thereof, it fails to meet the requirements of s.18 of the Act.

Judicial Notice

27 The essential requirements of the doctrine of judicial notice are succinctly reviewed in the *Law of Evidence in Canada, supra*, at p. 976:

> Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. It expedites the process of the courts, it creates uniformity in decision making and it keeps the courts receptive to societal change. Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.

At p. 979, the authors comment on subcategory (b) as follows:

> There are some facts which, although not immediately within the judge's knowledge, are indisputable and can be ascertained from sources to which it is proper for the judge to refer. These may include texts, dictionaries, almanacs and other reference works, previous case reports, certificates from various officials and statements from witnesses in the case.

28 Recently the doctrine of judicial notice was materially expanded to simplify the admission of various forms of social science research which the hearsay rule would have barred. See *Cronk v. Canadian General Insurance Co.* (1995), 128 D.L.R. (4th) 147 (Ont. C.A.); *Willick v. Willick*, [1994] 3 S.C.R. 670; *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481]; and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 [[1989] 6 W.W.R. 351].

29 The Supreme Court of Canada in *MacKay v. Manitoba*, recognized that broad social facts could be recognized under the

doctrine of judicial notice where a satisfactory factual foundation is laid. Later in *Moge*, L'Heureux-Dubé J. took judicial notice of social science research concerning the consequences of divorce on women without an expert first testifying to the validity of the research. She applied a similar approach in *Willick* but the majority refused to broaden the discussion of an appropriate award to consideration of a contextual approach in interpreting the statutory provisions applicable thereto. Mr. Justice Sopinka at p. 679 said:

> [it]... would require us to resolve the thorny question of the use of extraneous materials such as studies, opinions and reports and whether it is appropriate to take judicial notice of them and what notice to counsel, if any, is required. We would also have to consider the extent to which our approach is different in a case such as this from a constitutional case in which wider latitude is allowed. ...

30 Madam Justice L'Heureux-Dubé further outlined her approach concerning judicial notice of social science research in an article entitled *Re-Examining The Doctrine of Judicial Notice In The Family Law Context*: (1994) 20 Ottawa Law Review 551. There, she made a case for the general admission of social science research without the competency thereof being attested to by an expert witness. The manner in which the doctrine of judicial notice may be used, she suggested, varies with the nature of the research and the purpose for which it is tendered. Essentially she argued that such research and data fall into three distinct categories: (1) social authority; (2) social framework; and (3) social fact. The characteristics of these three categories and the rules of evidence applicable thereto were succinctly reviewed by Weiler J.A. in *Cronk* at p. 165:

> In her article, L'Heureux-Dubé J. adopts a structure and definitions, which I will also employ here, that divide social science research into three categories: (1) social authority; (2) social framework; and (3) social facts. Where social science relates to the lawmaking process in the same way as judicial precedent then it may be treated in the same manner as courts treat legal precedents. Such materials are useful background when dealing with policy or constitutional questions. The second category, social framework, refers to research that is used to construct a frame of reference or background context for deciding a case. Used as a social framework, the generality of social research causes it to bear greater resemblance to social authority than it does to social facts. When social science studies are used as social authority or as a social framework by a trial judge or tribunal without giving the parties an opportunity to comment on the studies it is usually considered to be an error but not one which will itself result in reversal: see *Eaton v. Brant County Board of Education* (1995), 123 D.L.R. (4th) 43 at p. 52, 27 C.R.R. (2d) 53, 22 O.R. (3d) 1 (C.A.); *R. v. Parnell* (1995), 98 C.C.C. (3d) 83, 80 O.A.C. 297, 27 W.C.B. (2d) 46 (C.A.), *per* Brooke J.A. for the majority at p. 94; *R. v. Désaulniers* (1994), 93 C.C.C. (3d) 371 at p. 383, 65 Q.A.C. 81, 25 W.C.B. (2d) 180 (C.A.). On the other hand, where social science research is used to resolve a dispute that is specific to the proceedings, the social science research takes on a character akin to the judge making a finding of fact based on it. If used in this manner, it appears to be necessary for trial courts to ensure that an opportunity is provided to the parties to properly introduce the evidence and to have it tested through cross-examination.

While not specifically mentioned by Weiler J.A., the social research referred to in the last two sentences of the above quotation fall within the social fact category adopted by L'Heureux-Dubé J.

31 In *Cronk*, the Ontario Court of Appeal held that in assessing damages, judicial notice should not be taken of studies published by the Council of Ontario Universities dealing with statistical data as to the length of time it takes for various classes of employees to obtain alternative employment following dismissal. Mr. Justice Lacourcière J.A. concluded that the studies were not so generally known or accepted as to challenge the validity of an established principle; nor did they constitute undisputed "social reality" as was the background information concerning the circumstances encountered by spouses in the dissolution of marriages employed in *Moge*.

32 Madam Justice Weiler in *Cronk* held that such studies could only be introduced in evidence through experts who must be available for cross-examination. The observations of Weiler J.A. are similar to those of L'Heureux-Dubé J. at pp. 566-57 of her

article where she stated that when social science research takes on an adjudicative quality concerning the issue before the court, oral evidence as to its validity and an opportunity to cross-examine are preconditions to its reception as documentary evidence. Neither Lacourcière J.A. nor Weiler J.A. expressed reservations regarding the use of social science research for adjudicative purposes in damage actions provided the same is "properly introduced".

33 Applying the principles outlined in *Willick, Moge* and *Cronk* to the Survey, I conclude that it was admissible under the social framework and social fact categories. To meet the requirements of the social framework category, the defendants were extended the opportunity to challenge the validity of the Survey but made no specific objections or comments regarding is validity. Nor did they seek an adjournment to arrange for experts to examine the Survey.

34 I also received the Survey as social fact evidence without the aid of expert evidence because of the unique circumstances before me. First and foremost, the defendants never questioned the general applicability of the Survey or expressed a need to cross-examine the creator of the Survey or an expert as to its validity or applicability to Ms. Redekopp's claim. Secondly, experts testifying before this Court in similar actions have relied on the Survey, or earlier versions thereof. See *Knoblauch v. Biwer Estate* [1992], 5 W.W.R. 725 (Sask. Q.B.). Thirdly, the data contained in the Survey did not enhance or corroborate Ms. Redekopp's claim. To the contrary, it suggested substantially less time is required to carry out specific activities than claimed by Ms. Redekopp. Absent the Survey, I would have been left only with Ms. Redekopp's evidence and case authorities for guidance. In retrospect, the Survey was of greater value to the defendants than to the plaintiff.

Procedural Considerations

35 Counsel were uncertain of the procedure for tendering social science research or data in evidence pursuant to (1) the Act; (2) as a public document under the common law exception; and (3) pursuant to the doctrine of judicial notice. In response to their uncertainty and concern with documentary evidence being sprung on an opposing party at trial, I will suggest a procedure which counsel may follow. While doing so, I stress that my suggestion is not intended to be binding, for the manner in which such evidence is accepted must remain within the discretion of each trial judge. The procedure consists, *inter alia*, of the following:

(1) Where a party or a party's witness will rely on documentary evidence at trial, including expert witnesses, such documents must be disclosed it in the propounder's statement as to documents. The Queen's Bench Rules currently require this step.

(2) Where documentary evidence will be proffered under the Act, the propounder should give the opposing party a copy of the document before the pre-trial conference, unless the document is disclosed in the propounder's statement as to documents and the inferences to be drawn from it are obvious.

(3) Where a document will be proffered as a public document under the common law exception to the hearsay rule, the propounder, before the pre- document must also be disclosed in sufficient detail to enable the opposing party to gauge the admissibility of the document without extensive research. The propounder must still meet the common law requirements previously described.

(4) Where a propounder intends to ask the court to take judicial notice of contents of a document within the social framework category described by L'Heureux-Dubé J., the propounder, before the pre-trial conference, should give the opposing party a copy of the document and an outline of the inferences to be drawn from it. The other party will then have ample time to challenge the inferences sought, including calling expert witnesses in the manner provided for in the *Queen's Bench Rules*.

(5) Where the propounder intends to ask the court to take judicial notice of a document as social fact evidence, the

propounder should, before the pre-trial conference, should provide the opposing party with a copy of the document and an outline of the inferences to be drawn from it. The propounder must also enquire whether the opposing party objects to the document being submitted in evidence without supporting expert testimony. If the opposing party objects, the document should not be offered as social fact evidence without an expert first opining to its validity and applicability to the issue at hand.

36 These procedures may help counsel in presenting documentary evidence in a cost efficient way without the opposing party being denied the opportunity of effectively responding at trial.

Application dismissed.

End of Document

1989 CarswellAlta 514
Supreme Court of Canada
R. v. Streu

1989 CarswellAlta 514, 1989 CarswellAlta 615, [1989] 1 S.C.R. 1521, [1989] 4 W.W.R. 577, [1989] A.W.L.D. 686, [1989] S.C.J. No. 59, 48 C.C.C. (3d) 321, 70 C.R. (3d) 1, 7 W.C.B. (2d) 332, 96 N.R. 58, 97 A.R. 356, J.E. 89-954, EYB 1989-66919

STREU v. R.

Wilson, La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ.

Heard: February 23, 1989
Judgment: June 8, 1989
Docket: No. 20317

Counsel: *D.G. Fedorak*, for appellant.
J. Watson, for respondent.

Subject: Criminal; Evidence

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal Law --- Evidence — Onus and standard of proof

Criminal law — Evidence — Hearsay — Admissibility of admission — Accused admitting to police officer posing as purchaser that certain goods had been "ripped off" by friend and that accused "knew they were hot" — Accused not merely reporting hearsay statement but adopting it as own — Any evidentiary weakness in information on which admission based matter of weight and not admissibility — Trial judge properly considering statement along with other evidence to convict accused of possession of stolen property.

Criminal law — Theft and related offences — Possession of stolen property — Evidence — Accused's statement to police officer posing as purchaser that certain goods had been "ripped off" by friend, and that he "knew they were hot" — Statement admissible though based on hearsay where person indicating belief or adopting it as own — Trial judge properly entering conviction. "ripped off" by friend, and that he "knew they were hot" — Statement admissible though based on hearsay where person indicating belief or adopting it as own — Trial judge properly entering conviction.

The accused attempted to sell four tires and rims to a police officer who was posing as a purchaser. At trial the officer testified the accused told him the goods had been "ripped off" by a friend, and that the accused said he "knew they were hot". The accused was charged with possessing stolen property. At trial the judge inferred from all the circumstances, including the admission of the accused, that the goods were stolen. The accused did not give evidence. The accused was convicted and his appeal from conviction was dismissed. The accused further appealed.

Held:

Appeal dismissed

An admission based on hearsay is admissible, if the person making the admission indicates a belief in or acceptance of the hearsay statement. A person can adopt a hearsay statement as his or her own for the purpose of admitting the facts therein. Accordingly, once it is established that the admission is made, there is no reason in principle for treating it any differently than if the admission had been made in the witness box. The rationale underlying the exclusion of hearsay evidence loses its force when the party chooses to rely on a hearsay statement in making an admission, as presumably the person has satisfied himself or herself as to the reliability of the statement or at least had the opportunity to do so. In this case it was clearly apparent that the accused was relying on the hearsay statement as being true and his admission was therefore admissible. In any event, the trial judge could well have concluded the accused had personal knowledge when he stated he "knew they were hot". Accordingly, even assuming the evidence other than the accused's admission was insufficient to support a conviction, the admission was admissible and any weakness in the information on which it was based was a matter of weight, not admissibility.

Table of Authorities

Cases considered:

Ares v. Venner, [1970] S.C.R. 608, 73 W.W.R. 347, 12 C.R.N.S. 349, 14 D.L.R. (3d) 4 [Alta.] — *considered*

Black v. Hardwell, [1935] 2 W.W.R. 172 (Sask. C.A.) — *referred to*

Kitchen v. Robbins, 29 Ga. 713 (1880) — *applied*

R. v. Elliott, [1985] 1 W.W.R. 97, 34 Alta. L.R. (2d) 50, 15 C.C.C. (3d) 195, 56 A.R. 113 (C.A.) — *considered*

R. v. McDonald (1980), 70 Cr. App. R. 288 (C.A.)*considered*

R. v. O'Neill (1976), 13 C.R. (3d) 193, 31 C.C.C. (2d) 259 (Ont. C.A.) — *considered*

R. v. Porter, [1976] Crim. L.R. 58 — *considered*

R. v. Rydzanicz (1979), 13 C.R. (3d) 190 (Ont. C.A.) — *considered*

R. v. Schmidt (Smith), [1948] S.C.R. 333, 6 C.R. 317, 92 C.C.C. 53, [1948] 4 D.L.R. 217, reversing [1948] O.R. 198, 5 C.R. 165, 90 C.C.C. 297, [1948] 2 D.L.R. 826 — *applied*

R. v. Vogelle, 70 W.W.R. 641, 9 C.R.N.S. 101, [1970] 3 C.C.C. 171 (Man. C.A.) — *considered*

Stowe v. Grand Trunk Pac. Ry. Co., [1918] 1 W.W.R. 546, 39 D.L.R. 127, affirmed 59 S.C.R. 665, 49 D.L.R. 684 [Alta.] — *referred to*

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46]

s. 312(1) [re-en. 1974-75-76, c. 93, s. 29; now s. 354(1)]

Authorities considered:

McWilliams, Canadian Criminal Evidence, 2nd ed. (1984), p. 428.

4 Wigmore, Evidence, Chadbourne rev. (1972), p. 18, para. 1053.

Appeal from judgment of Alberta Court of Appeal, 34 C.C.C. (3d) 553, 76 A.R. 381, dismissing appeal from conviction on charge of possessing stolen property with a value in excess of $200 contrary to s. 312(1) of Criminal Code.

The judgment of the court was delivered by *Sopinka J.*:

1 This is an appeal from the Alberta Court of Appeal [34 C.C.C. (3d) 553, 76 A.R. 381], which affirmed the decision of the trial judge finding the accused guilty of the charge of possession of stolen property having a value in excess of $200 contrary to s. 312(1) of the Criminal Code, R.S.C. 1970, c. C-34 (now R.S.C. 1985, c. C-46, s. 354).

Facts

2 The evidence at trial indicated that the appellant attempted to sell four tires and rims to a police officer who posed as a purchaser. The police officer testified to the following conversation with the appellant:

> I ask him, referring to wheels: What are these off of? And he replies: A Volkswagen Rabbit. And I ask: Oh, yeah. From the City here? And he replies: I don't know. My friend ripped them off. I ask: Well, where's the other ones? Harv replies: They're in my house. I reply: Oh, I see. Well, I'll give you twenty bucks apiece. And he replies: I can't let them go for that, they are my friend's wheels. I ask: How much did he want. And Harv replies: He priced them out at one hundred and thirty apiece. That's for the rims. I reply: I'm not paying that much. Just yesterday I bought a 1984 Datsun for $180 ...
>
> Harv replies: Well I know they're hot and all but they're his tires. I reply: Let me talk to your friend then. Harv replies: I know he'll be mad at me if I only get that much.

The appellant and the police officer proceeded to a garage at the end of a lane near the appellant's home to complete the sale. The appellant expressed concern that they not be observed. The police officer further testified that he paid the appellant $125 for the tires and rims.

The Courts Below

3 In convicting the accused, the learned trial judge stated:

> I have been satisfied beyond a reasonable doubt that the requirements of this offence have been met by the Crown. Defence has stated that Crown has failed to prove that the goods were in fact stolen. Each indicia by itself would not be sufficient; I agree with Mr. Fedorak. The sale price by itself, in view of the decision of our Court of Appeal, although raising suspicions, would not be sufficient. However, when one looks at all of the circumstances, the statements made by the accused to the undercover officer, the sale price for the goods which admittedly is one-tenth of their new value, (and it is not argued they were new) and to that I add all of the behaviour of the accused which in my view shows that the he was in the possession of stolen goods. If the words spoken to the Constable are examined carefully, coupled with the rest of the information, there is, as suggested by Mr. Yusep, circumstantial evidence from which I may draw an inference, and I do draw that inference. I feel under the circumstances it cries for an explanation.

4 The majority of the Court of Appeal was of the view that there was sufficient circumstantial evidence apart from the admission by the appellant upon which a conviction could be based. Hetherington J.A., dissenting, would have allowed the appeal on the ground that the appellant's lack of personal knowledge of the theft of the items rendered his statement of no evidential value in relation to the question of whether the items were stolen. She was of the opinion that no other circumstantial evidence existed upon which the trial judge could have inferred that the items were stolen.

The Issue

5 I am prepared to assume that, in the absence of the admission made by the appellant, the evidence before the trial judge was insufficient to meet the criminal standard of proof. The central issue therefore is the admissibility of the admission and its evidentiary value.

The Authorities

6 The following are the relevant authorities referred to in this court. In *R. v. Vogelle*, 70 W.W.R. 641, 9 C.R.N.S. 101, [1970] 3 C.C.C. 171 (Man. C.A.), the accused, Vogelle, met the accused, Reid, outside a store and after walking together for several blocks the latter removed some cloth from under his jacket and handed it to Vogelle, who put it into a shopping bag.

Seeing a constable, the two ran but were apprehended. Vogelle told the police that he had purchase the cloth from a girl and "figured it was hot". Reid's statement contained the following admission: "Because of the price that had been paid for the cloth it had to be stolen from some place. I do not know where the stuff was stolen from." The accused appealed against convictions for possession under $50. Property in the stolen goods was allegedly that of a person or persons unknown. It was argued upon appeal that the Crown had failed to prove that the goods were stolen.

7 In allowing the appeal, Dickson J.A. (as he then was), speaking for the majority, identified the elements of the offence and then continued, at pp. 104-105:

> The theft and the ownership may be proven by direct evidence of the owner or some other person, or they may be proven by circumstantial evidence. The circumstances of the accused's possession may lead compellingly to the conclusion that the goods are stolen goods and the owner someone other than the accused. If circumstantial evidence is relied upon, however, it must be received with caution. There is no onus upon an accused to prove that he came into possession of the goods honestly. He does not have to account for his possession. Refusal or failure to give a satisfactory explanation as to the manner in which he acquired the goods, or even conflicting explanations, do not afford proof that the goods were stolen.

He went on to state that the trend in Canada was a reluctance to draw conclusions of guilt from circumstances giving rise to suspicion. In this case (at p. 107):

> The statements given to the police, with the evidence of the shopping bag and flight, fall short of proving that the goods were stolen. A finding of guilt must rest firmly upon fact or inference, not upon suspicion or upon an inference drawn from another inference.

8 Freedman J.A., dissenting, concluded, at p. 108, that the circumstantial evidence in this case was "of such a character as would lead any reasonable person to draw the inference that a theft had taken place".

9 In *R. v. McDonald* (1980), 70 Cr. App. R. 288 (C.A.), no direct evidence existed that the property, a television set, had been stolen. The accused admitted to the police that he believed it to be stolen. He also stated that he had bought the set for £90 from an unknown man at a betting shop. The accused stated that he believed the property to be worth three times that amount. Counsel for the accused moved that there was no case to answer, which was rejected by the trial judge. The issue before the Court of Appeal was whether, at the end of the prosecution's case, there was any evidence upon which a jury, properly directed, could have found the accused guilty.

10 The Court of Appeal held that the case against the accused did not depend on the accused's statement that he believed the set to be stolen. Instead, he made admissions based upon what he himself knew — namely, that he bought the set from an unknown man in a betting shop for £90 when he thought the set was worth £280. The court concluded, at p. 290:

> In our judgment the appellant had admitted circumstances within his own knowledge from which the jury were entitled to infer that the set had been stolen.

11 In *R. v. O'Neill* (1976), 13 C.R. (3d) 193, 31 C.C.C. (2d) 259 (Ont. C.A.), the only evidence against the accused regarding the theft of a stereo and turntable — the subjects of the charge against her of unlawful possession — was her

statement to the police. In response to the question to whether she knew that the items were stolen the accused replied "yes". She then added that she had been given the items by a male friend.

12 The Court of Appeal followed *R. v. Porter*, [1976] Crim. L.R. 58, in finding that the hearsay statement of the accused was not proof that the items were stolen. The court, at p. 194, cited the editorial commentary following *Porter* with approval:

> It is one thing for the accused to admit facts of which he has personal knowledge and for an inference to be drawn from those facts that the goods are stolen. It is another thing for the accused to 'admit' facts of which he has no personal knowledge.

13 In *R. v. Rydzanicz* (1979), 13 C.R. (3d) 190 (Ont. C.A.), the accused was charged with having in his possession a quantity of stolen cigarettes. The accused stated to the police that he saw his friend Mike enter the shopping centre and come out with a whole shopping cart full of cartons of cigarettes. The accused added that he helped Mike put the cigarettes in the back of the truck. The accused also stated that he knew that the cigarettes were stolen when he saw Mike come out of the shopping centre.

14 The accused was acquitted at trial on the strength of *O'Neill*, supra. The Court of Appeal overturned the acquittal because the trial judge had overlooked the fact that the accused stated that he saw Mike go into the store and come out with a shopping cart full of cigarettes. The Court of Appeal, at p. 192, held that:

> That admission was based on the personal knowledge of the respondent, and constituted evidence of relevant fact in a chain of circumstances in support of an inference that the cigarettes were stolen.

15 Aside from the accused's stated belief, sufficient circumstantial evidence existed to support a finding that the goods were stolen. The Court of Appeal added that it is a question of fact whether the inference that the goods were stolen should be drawn by the trier of fact.

16 In *R. v. Elliott*, [1985] 1 W.W.R. 97, 34 Alta. L.R. (2d) 50, 15 C.C.C. (3d) 195, 56 A.R. 113 (C.A.), the accused was charged with possession of certain roof panels, the property of person or persons unknown, knowing them to "have been obtained by the commission in Canada of theft" contrary to s. 312 of the Criminal Code. The items involved were worth approximately $1,300, although the accused testified that he paid $50 for them, having purchased them from an unknown person in a bar. He did not receive a sales slip for the goods and the police testified that the accused told them that because of the low price he paid he realized they were "hot". There was no evidence as to where the goods had been obtained or who their owner was. On appeal by the accused from his conviction, the appeal was allowed and an acquittal entered.

17 The majority held that it was clear that the element of theft can be proved by circumstantial evidence. In this case, the circumstantial evidence was not strong enough to support the inference that the goods were stolen (at p. 201):

> Here the only evidence of theft is proof of purchase for far below value, at a bar, from a stranger, without a bill of sale. Certainly, this gives rise to the suspicion that the goods which are being sold were stolen. Certainly in a civil case a court could prove on a balance of probabilities that a theft had occurred but I am of the opinion that proof of theft beyond all reasonable doubt has not been established by these facts alone. There has to be more.

Foisy J. held that the circumstances in this case were strong enough to support the inference that the goods were in fact stolen. He agreed in the result, however, because he held that the Crown had failed to prove that the theft had been committed in Canada.

Analysis

18 Although they do not always make it clear, some of these authorities deal with the question relating to the use to be made of an admission based on hearsay as a matter of weight, and others, as a matter of admissibility. In deciding which position is correct, account must be taken of the decision of this court in *R. v. Schmidt (Smith)*, [1984] S.C.R. 333, 6 C.R. 317, 92 C.C.C. 53, [1948] 4 D.L.R. 217 [Ont.], a case that apparently was not drawn to the attention of the Court of Appeal and is not referred to in the factum of either party in this court. That case dealt with a charge of incest between the accused and his alleged sister. Letters were introduced by the prosecution which contained admissions as to the relationship. The Court of Appeal held that this evidence was inadmissible and quashed the conviction with Roach J.A. dissenting [[1948] O.R. 198, 5 C.R. 165, 90 C.C.C. 297, [1948] 2 D.L.R. 826]. This court held that, although based on hearsay, the evidence was admissible. Inasmuch, however, as other evidence, which was inadmissible, had been admitted at the trial, a new trial was ordered. Kerwin J. stated, at p. 335:

> On the second point the majority of the Court of Appeal took the view that if the accused believed he was a brother of the complainant, there was nothing to show that such a belief was founded on anything except hearsay. On the other hand, the dissenting judge believed that what was written by the accused was an admission entitled to be relied upon in the same way, although not necessarily with the same force, as if the accused, while in the witness box and while denying the act of intercourse, had under oath stated that he and Elsie were brother and sister.

He continued at p. 336

> Ordinarily an admission of a fact by a party is evidence against him of that fact. The statement in section 1053 of the third edition of Wigmore on Evidence that admissions are not subject to the rule for testimonial qualifications of personal knowledge is borne out by the decision, referred to by the author, of the Court of Appeal of Alberta in *Stowe v. Grand Trunk Pacific Railway Co.*, affirmed in this Court.

Kerwin J. approved the reasoning of Roach J.A., dissenting in the Court of Appeal, who tested the admissibility of the admission by drawing a parallel between it and a statement made on the stand by the same party. Kerwin J. concluded, at p. 336:

> In such a case as this there is no reason why a statement by the accused of his relationship with the complainant is not evidence any more than if he had stated it in the witnessbox, as referred to by Roach, J.

Kellock J., who agreed in the result, stated at p. 338:

> Dealing first with the letters, I think the abbreviation "Brot." is to be interpreted as having been used as an abbreviation of the word "brother" and the jury were entitled to treat both letters, if they considered the handwriting of the accused to have been proved, as admissions against him.

Furthermore, it is clear that a party making an admission may adopt a hearsay statement as his or her own for the purpose of admitting the facts therein: see *Black v. Hardwell*, [1935] 2 W.W.R. 172 (Sask. C.A.), and *Stowe v. Grand Trunk Pac. Ry. Co.*, [1918] 1 W.W.R. 546, 39 D.L.R. 127, affirmed (1918), 59 S.C.R. 665, 49 D.L.R. 684 [Alta.].

19 The rationale underlying the exclusion of hearsay evidence is primarily the inherent untrustworthiness of an extra-judicial statement which has been tendered without affording an opportunity to the party against whom it is adduced to cross-examine the declarant. The rationale applies equally in both criminal and civil cases. It loses its force when the party has chosen to rely on the hearsay statement in making an admission. Presumably in so doing, the party making the admission has satisfied himself or herself as to the reliability of the statement or at least had the opportunity to do so. The significance of this factor is evident in the decision of this court in *Ares v. Venner*, [1970] S.C.R. 608, 73 W.W.R. 347, 12 C.R.N.S. 349, 14 D.L.R. (3d) 4 [Alta.], in which evidence was admitted as an exception to the hearsay rule where the party against whom the evidence was tendered had the opportunity to test the accuracy of the evidence.

20 I agree with the following statement in *Kitchen v. Robbins*, 29 Ga. 713 at 716 (1880), cited by 4 Wigmore, Evidence, Chadbourn rev. (1972), para. 1053, for which I am indebted to McWilliams, Canadian Criminal Evidence, 2nd ed. (1984), at p. 428:

> Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest, that they are true, and that is evidence to the jury that they are true.

21 Accordingly, once it is established that the admission was in fact made, there is no reason in principle for treating it any differently than the same statement would be treated had it been made in the witness box. In the latter case, if a party indicates a belief in or acceptance of a hearsay statement, that is some evidence of the truth of its contents. The weight to be given to that evidence is for the trier of fact. On the other hand, if the party simply reports a hearsay statement without either adopting it or indicating a belief in the truth of its contents, the statement is not admissible as proof of the truth of the contents.

Conclusion and Disposition

22 Turning to the admission in question in this appeal, it is impossible to read it as merely reporting a hearsay statement without more. Clearly the appellant was relying on the hearsay statement as being true. Either he accepted it as being true or at least believed it to be true.

23 Furthermore, the trial judge may very well have concluded that the appellant had personal knowledge to state: "I know they're hot." These words are not necessarily limited by the previous comments: "I don't know. My friend ripped them off." No evidence was led by the appellant, who did not testify. The trial judge might have reached this conclusion or the conclusion that the appellant accepted his friend's explanation, believed it to be true or, indeed, satisfied himself from all the circumstances that the property was stolen. In any of the above alternatives, the evidence was admissible. Any evidentiary weakness in the information on which the admission was based was a matter of weight and not admissibility. This was a matter for the trial judge, who considered the statement along with other evidence and concluded that the accused was guilty beyond a reasonable doubt. This result was affirmed by the majority of the Court of Appeal. There are, therefore, concurrent findings of fact with which this court should not ordinarily interfere. For these reasons, I would dismiss the appeal.

Appeal dismissed.

2006 FC 270, 2006 CF 270
Federal Court
Canada (Minister of Citizenship & Immigration) v. Seifert

2006 CarswellNat 4855, 2006 CarswellNat 494, 2006 FC 270, 2006 CF 270, [2006] F.C.J. No. 344, 146 A.C.W.S. (3d) 415, 288 F.T.R. 1 (Eng.), 43 Admin. L.R. (4th) 1

The Minister of Citizenship and Immigration, Plaintiff and Michael Seifert, Defendant

O'Reilly J.

Heard: September 1-11, 2005; February 9, 10, 2006
Judgment: March 1, 2006
Docket: T-2016-01

Counsel: Barney Brucker, for Plaintiff
Douglas H. Christie, for Defendant

Subject: Evidence; Immigration; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Evidence --- Documentary evidence — Business records — What constituting

Plaintiff immigration and citizenship minister brought revocation proceedings under s. 18(1)(b) of Citizenship Act against defendant citizen on basis that he failed to disclose activities during World War II as German guard at Italian transit camp — Minister and citizen sought to introduce scores of various categories of documents including German and Canadian governmental memoranda and reports from 1940s and 1950s, published accounts of events at transit camp and records of individual's employment, citizenship and departure from Germany to Canada — Parties contested admissibility of each other's documents — Ruling was required on admissibility — Ruling was issued to admit government documents not otherwise inadmissible under s. 30 of Evidence Act, related to business records, and documents satisfying principled approach to hearsay evidence based on necessity and reliability — Documents generated within government departments or agencies not otherwise inadmissible under s. 30 of Act were admissible as business records — Given breadth of definition of "business" in s. 30(12) of Act, documents produced in usual course of governmental activity qualified as business documents, admissible for truth of contents — Citizen's argument that admission of documents under s. 30 of Act required living declarant was not supported — Business document exception in s. 30(1) of Act simply restricted use of document to introduce evidence from person who could not be witness in proceeding — Documents surrounding screening of candidates for admission to Canada after World War II were inadmissible as exception to business records rule, pursuant to ss. 30(1)(a)(i),(ii) of Act as relating to investigation or inquiry — Policy documents, memoranda and personal records were not admissible as these were not business records as contemplated under s. 30 of Act.

Evidence --- Hearsay — Exceptions — General

Plaintiff immigration and citizenship minister brought revocation proceedings under s. 18(1)(b) of Citizenship Act against defendant citizen on basis that he failed to disclose activities during World War II as German guard at Italian transit camp — Minister and citizen sought to introduce scores of various categories of documents including German and Canadian governmental memoranda and reports from 1940s and 1950s, published accounts of events at transit camp and records of individual's employment, citizenship and departure from Germany to Canada — Parties contested admissibility of each other's documents — Ruling was required on admissibility — Ruling was issued to admit government documents not otherwise inadmissible under s. 30 of Evidence Act, related to business records, and documents satisfying principled approach to hearsay evidence based on necessity and reliability — Documents meeting criteria of necessity and reliability were properly admissible following flexible approach to hearsay evidence under Supreme Court of Canada jurisprudence — Case dealt with events that took place decades earlier and criterion of necessity was satisfied as many facts could be proved only through documents — Documents authored by high level government authorities had inherent reliability — Authorities had no motivation to mislead, documents were available in public archives and no concerns had been voiced related to their authenticity or reliability — Archivists' attesting to authenticity of documents met threshold criterion of reliability.

Immigration and citizenship --- Citizenship — Loss of citizenship — False representation, fraud or concealing material circumstances

Plaintiff immigration and citizenship minister brought revocation proceedings under s. 18(1)(b) of Citizenship Act against defendant citizen on basis that he failed to disclose activities during World War II as German guard at Italian transit camp — Minister and citizen sought to introduce scores of various categories of documents including German and Canadian governmental memoranda and reports from 1940s and 1950s, published accounts of events at transit camp and records of individual's employment, citizenship and departure from Germany to Canada — Parties contested admissibility of each other's documents — Ruling was required on admissibility — Ruling was issued to admit government documents not otherwise inadmissible under s. 30 of Evidence Act, related to business records, and documents satisfying principled approach to hearsay evidence based on necessity and reliability — Documents generated within government departments or agencies not otherwise inadmissible under s. 30 of Act were admissible as business records — Given breadth of definition of "business" in s. 30(12) of Act, documents produced in usual course of governmental activity qualified as

business documents, admissible for truth of contents — Citizen's argument that admission of documents under s. 30 of Act required living declarant was not supported — Business document exception in s. 30(1) of Act simply restricted use of document to introduce evidence from person who could not be witness in proceeding — Documents surrounding screening of candidates for admission to Canada after World War II were inadmissible as exception to business records rule, pursuant to ss. 30(1)(a)(i),(ii) of Act as relating to investigation or inquiry — Policy documents, memoranda and personal records were not admissible as these were not business records as contemplated under s. 30 of Act.

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Canada (Minister of Citizenship & Immigration) v. Fast (2003), 240 F.T.R. 161, 2003 CF 1139, 32 Imm. L.R. (3d) 167, 2003 CarswellNat 4428, 2003 FC 1139, 2003 CarswellNat 3038 (F.C.) — referred to

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R. v. Finestone (1953), 17 C.R. 211, [1953] 2 S.C.R. 107, 1953 CarswellQue 9, 107 C.C.C. 93 (S.C.C.) — considered

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R. v. Khan (1990), 113 N.R. 53, 79 C.R. (3d) 1, 41 O.A.C. 353, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 1990 CarswellOnt 108, 1990 CarswellOnt 1001 (S.C.C.) — considered

R. v. P. (A.) (1996), 109 C.C.C. (3d) 385, 92 O.A.C. 376, 1 C.R. (5th) 327, 1996 CarswellOnt 3150 (Ont. C.A.) — considered

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Statutes considered:

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Generally — referred to

s. 23 — referred to

s. 30 — considered

s. 30(1) — considered

s. 30(3) — considered

s. 30(10) — considered

s. 30(10)(a) — considered

s. 30(10)(a)(i) — considered

s. 30(10)(a)(ii) — considered

s. 30(10)(a)(iii) — considered

s. 30(10)(a)(iv) — considered

s. 30(12) "business" — considered

s. 30(12) "affaires" — considered

Citizenship Act, R.S.C. 1985, c. C-29
Generally — referred to

s. 18(1)(b) — considered

s. 25(1) — considered

RULING on admissibility of documentary evidence.

O'Reilly J.:

I. Overview

1 This is a citizenship revocation proceeding under s. 18(1)(*b*) of the *Citizenship Act*, R.S.C. 1985, c. C-29. The defendant, Mr. Michael Seifert, is alleged to have obtained entry to Canada and Canadian citizenship by fraud or misrepresentation. In particular, the plaintiff is attempting to prove that Mr. Seifert failed to disclose his place of birth and activities during the Second World War, when he allegedly served in the German forces as a guard at a police transit camp in Bolzano, Italy.

II. Admissibility of Documentary Evidence

2 The parties contest the admissibility of scores of documents. I heard submissions regarding many of these documents on September 12, 2005 but, in the interests of minimizing delay, I decided to reserve ruling on admissibility until a later point in this proceeding (my earlier decision is attached as Annex B). I have now received further submissions with respect to all of the documents tendered so far. In short, the plaintiff argues that the documents are admissible under various exceptions to the hearsay rule. The defendant submits that the documents contain inadmissible hearsay and cannot be received in evidence.

3 The documents in issue fall into various categories. Some are governmental memoranda and reports from the 1940s and 1950s, some Canadian, some German. Others are records relating to Mr. Seifert's employment, citizenship and departure from Germany to Canada. In addition, the parties contest the admissibility of various published accounts of events at the Bolzano camp.

4 I have reviewed all of the grounds of admissibility advanced by the plaintiff and all of the objections put forward by the defendant. I have assembled those arguments into the two-step approach described below. Before dealing with them, some preliminary observations are in order.

5 The plaintiff advanced four independent grounds of admissibility. I do not need to consider two of them - the exceptions to the hearsay rule relating to public documents and ancient documents. With respect to the public documents exception, the plaintiff relied on the cases of *R. v. Finestone*, [1953] 2 S.C.R. 107 (S.C.C.) and *R. v. P. (A.)* (1996), 1 C.R. (5th) 327 (Ont. C.A.). However, I do not regard any of the documents submitted by the plaintiff as being similar to the kinds of documents at issue in those cases, or in any of the several cases cited in them. The documents covered by the doctrine recognized in those cases were records created by public servants under a duty to make an accurate account of certain activities or events. In *Finestone*, above, Justice Rand relied on cases dealing with public registers and ships' manifests and found that a bill of lading was admissible. In *R. v. P. (A.)*, above, Justice Laskin held that certain court records - a charge document and a probation order - were admissible. He made clear that a "public document" is one that is "made for the purpose of the public making use of it, and being able to refer to it" (at p. 332, quoting from the House of Lords' decision in *Sturla v. Freccia* (1880), (1879-80) L.R. 5 App. Cas. 623 (U.K. H.L.)).

6 Here, many of the documents in issue were made by public servants who had a duty to record certain events accurately. However, they were not made with the intention that the public would make use of them or even have access to them. Indeed, many of them are marked "Confidential" or "Secret". I do not regard these as "public documents".

7 Regarding the ancient documents exception to the hearsay rule, the plaintiff relied on *Delgamuukw v. British Columbia*, [1989] B.C.J. No. 1385 (B.C. S.C.). In that case, Chief Justice McEachern acknowledged that ancient documents (more than 30 years old) can be admitted as proof of their contents if they are free from suspicion. To determine whether the documents are free from suspicion, Chief Justice McEachern suggested that Wigmore's two "great rules of necessity and a circumstantial guarantee of trustworthiness are as good a test as any that might be suggested" (at p. 2). These criteria are identical to those that underlie the principled approach to hearsay exceptions recognized by the Supreme Court of Canada in the well-known trilogy of cases: *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.); *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.) and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.). *Delgamuukw*, above, predates those cases and, in my view, the particulars of the ancient documents doctrine set out in it have been overtaken by the Supreme Court of Canada's overarching approach to admitting hearsay evidence. Certainly, the two important criteria cited by Chief Justice McEachern are co-extensive with the Supreme Court's ruling that hearsay can be admitted where the requirements of necessity and reliability have been met. Accordingly, my consideration of the principled approach to the hearsay rule obviates the need to consider the ancient documents doctrine as a separate and free-standing ground of admissibility.

8 There are two considerations that I do not discuss below but which also form an important part of my analysis. First, I must determine whether a particular document is relevant to a fact in issue in this case. Accordingly, for each document, I have considered its relevance to an allegation in the plaintiff's statement of claim. Second, I must decide if the document tendered is actually being tendered by the plaintiff as proof of the truth of its contents. It is only then that I must consider whether there is an applicable hearsay exception. For the vast majority of the documents before me, this purpose is clear. Nevertheless, I have considered each document with this consideration in mind. In some cases, the plaintiff has acknowledged that a particular document was being offered for a limited evidentiary purpose.

9 I must emphasize that, where I have ruled a document admissible as evidence of the truth of its contents, this does not necessarily mean that I take a particular fact as having been proved. At this stage, I am simply deciding whether a document constitutes admissible evidence. It is only at the end of the case, based on the whole of the evidence, that I will decide the facts.

10 With that in mind, I have reserved one of the defendant's submissions for consideration at a later point. In respect of certain of the plaintiff's documents, the defendant has argued that their probative value, if any, is exceeded by their prejudicial effect. It is unnecessary for me to consider a document's probative value at this stage. This is a matter relating to the weight to be assigned to the evidence, not its admissibility. If, at the end of the case, I am satisfied that a particular document's probative value is exceeded by its prejudicial effect, I will disregard it.

III. Determining Admissibility

A. Business records

11 The plaintiff's main argument is that the majority of the documents before me constitute business records and are admissible under s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (relevant enactments are set out in Annex A). The plaintiff submits that these documents were created in "the usual and ordinary course of business" (s. 30(1)). In addition, where original documents were unavailable, the plaintiff supplied affidavits that explained why the originals could not be produced (*e.g.* because they could not be removed from public archives), identified the documents' locations, attested to the documents' authenticity, and vouchsafed the accuracy of the copies, as permitted by s. 30(3) of the Act.

12 The defendant has put forward numerous objections to the plaintiff's reliance on the business records exception. I have dismissed five of those arguments, but I carefully considered the remainder. First, the defendant submits that many documents fall outside the intended scope of s. 30 because they contain opinions and analysis - they are not merely recorded entries in a file or chart (as in *Ares v. Venner*, [1970] S.C.R. 608 (S.C.C.)). I am satisfied, however, that documents containing opinions may still qualify as business documents and be admissible under s. 30 for the truth of their contents (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd Ed. (Markham: Butterworths, 1999), p. 229, § 6.163). That does not mean, of course, that I am bound by whatever opinions may be expressed in those documents.

13 Second, the defendant argues that documents generated within government departments or agencies cannot be "business documents". However, given the breadth of the definition of "business" in s. 30(12) of the Act, I am satisfied that documents produced in the usual and ordinary course of governmental activity or operations may qualify as business documents and be admissible under s. 30 for the truth of their contents. Section 30(12) specifically provides that the term "business" includes "any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, ... or by any other body or authority performing a function of government".

14 Third, the defendant argues that many of the plaintiff's supporting affidavits are defective and do not comply with s. 30(3). Specifically, the defendant submits that it is inappropriate for archivists to state that a particular document was prepared in the usual and ordinary course of business in an attempt to satisfy the requirements of s. 30. I agree that an archivist's opinion on the question whether a document was prepared "in the usual and ordinary course of business" cannot take the place of the court's determination of that issue for purposes of s. 30 of the Act (compare *Canada (Minister of Citizenship & Immigration) v.*

Fast, 2003 FC 1139, [2003] F.C.J. No. 1428 (F.C.), and *Canada (Minister of Citizenship & Immigration) v. Oberlander* (1998), [1999] 1 F.C. 88, [1998] F.C.J. No. 1380 (Fed. T.D.)). On the other hand, the fact that an archivist has expressed an opinion on that subject does not render his or her affidavit inadmissible or irrelevant in respect of other issues.

15 Fourth, the defendant argues that no document can be admitted under s. 30 if the declarant is not living. Sub-paragraph 30(10)(*a*)(*iv*) provides that a record of a statement made by a person who is not a competent and compellable witness in the proceeding cannot be admitted as a business document. Further, it provides that a record of a statement made by a person who, if living and of sound mind, would not be a competent and compellable witness also cannot be admitted as a business document. I was asked to interpret this rule as prohibiting the admission of documents authored by persons who are now dead and, therefore, are not compellable as witnesses in these proceedings. I do not read the provision this way. In my view, it simply states that the business document exception in s. 30(1) cannot be used to introduce evidence from a person, whether living or dead, who could not be a witness in the proceeding (see *R. v. Heilman*, [1983] M.J. No. 390, 22 Man. R. (2d) 173 (Man. Co. Ct.)).

16 Fifth, the defendant submits that all documents relating to the policies and practices surrounding the screening of candidates for admission to Canada after World War II are inadmissible because, by definition, they relate to an investigation or inquiry, or to the preparation or provision of legal advice, or were generated in contemplation of legal proceedings and, therefore, fall under exceptions to the business records rule as set out in s. 30(10)(*a*)(*i*), and (*ii*). While I do not regard all documents relating to immigration screening, by definition, as coming within those exceptions, I have considered whether particular documents might be inadmissible for those reasons (see, e.g., *R. v. Palma* (2000), 149 C.C.C. (3d) 169 (Ont. S.C.J.)).

17 As a general matter, I agree with the defendant's argument that many of the plaintiff's documents cannot be considered business records. In particular, policy documents, memoranda and personal correspondence do not strike me as the kind of documents admissible as business records under s. 30 of the *Canada Evidence Act*. Correspondingly, the various exceptions contained in s. 30(10) of the Act do not prevent the admission of documents that are not business records.

B. Necessity and Reliability

18 In a trilogy of cases, the Supreme Court of Canada has made clear that courts should apply a flexible approach to hearsay evidence (*Khan*; *Smith*; *B. (K.G.)* above). The Court held that hearsay should be admitted when the criteria of necessity and reliability are met.

19 Those cases all dealt with oral statements that were made out of court, not documents. However, the same approach can and should be applied to documentary evidence. Indeed, the trilogy of cases built upon the approach to documentary hearsay that had been established much earlier in *Ares v. Venner*, above.

(1) Necessity

20 The Supreme Court stated that it may be necessary to admit hearsay evidence when other evidence is unavailable. It may be unavailable because a witness is incompetent (*e.g.* as in *Khan*, above) or is dead. Or it may be necessary to admit the evidence because there is no other convenient way of proving a fact that is in issue in the case (*Smith*, above).

21 This case deals with events that took place decades ago. The plaintiff has called witnesses who have given direct evidence about their work and experiences in the period during the 1940s and 1950s. However, many facts can be proved only through documents. In my view, generally speaking, the criterion of necessity is clearly present in relation to most of the documents tendered in this case. The real issue is reliability.

(2) Reliability

22 The inherent danger in admitting hearsay evidence is that its reliability cannot tested through the usual means - that is, by cross-examination - because the maker or author of the particular statement is not before the court. Accordingly, before admitting hearsay evidence, judges must look for some indication of its reliability in order to alleviate the concern about the lack of cross-examination. To put it another way, judges must consider whether there are reasons to question the accuracy of the declarant's perception, memory, objectivity or credibility.

23 The defendant contests the reliability of many of the documents tendered by the plaintiff. In particular, the defendant argues that many of the archivists' affidavits are inadequate because they contain "boilerplate" or incomplete descriptions of the documents attached to them. I have reviewed and considered all of those affidavits in ruling on the admissibility of the corresponding documentary evidence. I have found them to be accurate and complete.

24 Further, the defendant argues that, given that the value of the opinions of the expert historians who relied on many of the documents in issue here is proportionate to the extent to which the facts on which they rely have been proved, the experts' reliance on certain documents cannot at the same time be taken as an indication that the documents are reliable. I disagree. The fact that expert historians have found certain documents to be authentic and a good source of historical information can be a basis for concluding that those documents meet the threshold criterion of reliability and are admissible (*Fast*, above). However, that does not mean, of course, that I am bound to interpret the documents in the same way as the historical experts did, or to give them the same weight.

25 In my view, many of the documents tendered by the plaintiff are inherently reliable. They were authored by persons who were responsible for the stewardship of the Canadian government at the very highest levels - at Cabinet and at the upper echelons of the bureaucracy. I have been given no reason to suspect that the authors were mistaken or motivated by a desire to mislead. To the contrary. It was important to record and communicate decisions and policies in an accurate and clear fashion. Similarly, many documents before me were authored by German officers or officials who had a similar interest in ensuring the transmission of accurate information. In addition, these documents have been available for review in public archives for many years and exposed to the scrutiny of scholars and the public. One would expect that any serious concerns about their authenticity or reliability would have come to light.

26 My general approach is consistent with that of Chief Justice Lamer in *Smith*, above, at paragraph 45:

> In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused.

27 Accordingly, I have noted in my comments in Annex C certain features of the documents that pertain to their reliability. But I have not explicitly set out the general observation that the documents, as a whole, appear to be reliable. Nor have I expressly noted the reliance that each expert has placed on a particular document, although I have identified the witnesses through whom each document was introduced.

IV. A Two-step Approach

28 I have decided whether a document is admissible by answering the following questions:

1. (a) Is the document a business document, in the sense that it was prepared in the usual and ordinary course of business, including the business of government?

(b) If so, is it nevertheless inadmissible because:

(i) it was made in the course of an investigation or inquiry (s. 30(10))(*a*)(*i*));

(ii) it was made in the course of obtaining legal advice, or in contemplation of a legal proceeding (s. 30(10)(*a*)(*ii*));

(iii) it is privileged (s. 30(10)(*a*)(*iii*));

(iv) it relates to a statement made by a person who is not, or, if living, would not be, competent or compellable to disclose what is contained in the document (s. 30(10)(*a*)(*iv*))?

2. If the document is not admissible as a business document, is it admissible under the principled approach to hearsay evidence based on necessity and reliability? In particular:

(a) Is admission of the document evidence reasonably necessary, in the sense that there is no other convenient way of presenting the evidence contained in it?

(b) Is the evidence contained in the document reliable, in the sense that there is some indication that the document is trustworthy; that is, something that substitutes for the usual means of testing the reliability of testimony, namely, cross-examination?

V. Disposition

29 I have set out in Annex C a list of all documents whose admissibility remains contested between the parties. I have included in that list brief reasons for my ruling on each document. Should it become necessary or appropriate at a later point, I may expand on those reasons.

Order

THIS COURT ORDERS that:

1. The documents identified in Annex C as being admissible are admitted in these proceedings;

2. The defendant shall inform the Court and the plaintiff of the identities of his proposed witnesses, their addresses, and the general subject matter of their testimony on or before March 3, 2006;

3. The defendant shall produce to the plaintiff copies of any documents that he proposes to introduce on or before March 3, 2006

4. The Court will sit in Vancouver from March 8-17 to hear defence witnesses.

Order accordingly.

Annex A

Citizenship Act, R.S.C. 1985, c. C-29
Notice to person in respect of revocation
18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

[. . .]
(b) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

CanadaEvidence Act, R.S.C. 1985, c. C-5
Business records to be admitted in evidence
30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

[. . .]
Copy of records
(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is—(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or—(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.[. . .]
Evidence inadmissible under this section
(10) Nothing in this section renders admissible in evidence in any legal proceeding
(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

Loi sur la Citoyenneté, L.C.R. 1985, ch. C-29
Avis préalable à l'annulation
18. (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée:
[. . .]
b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels..

Loi sur la preuve au Canada, L.R.C. 1985, ch.C-5
Les pièces commerciales peuvent être admises en preuve
30. (1) Lorsqu'une preuve orale concernant une chose serait admissible dans une procédure judiciaire, une pièce établie dans le cours ordinaire des affaires et qui contient des renseignements sur cette chose est, en vertu du présent article, admissible en preuve dans la procédure judiciaire sur production de la pièce.
[. . .]
Copie des pièces
(3) Lorsqu'il n'est pas possible ou raisonnablement commode de produire une pièce décrite au paragraphe (1) ou (2), une copie de la pièce accompagnée d'un premier document indiquant les raisons pour lesquelles il n'est pas possible ou raisonnablement commode de produire la pièce et d'un deuxième document préparé par la personne qui a établi la copie indiquant d'où elle provient et attestant son authenticité, est admissible en preuve, en vertu du présent article, de la même manière que s'il s'agissait de l'original de cette pièce pourvu que les documents satisfassent aux conditions suivantes: que leur auteur les ait préparés soit sous forme d'affidavit reçu par une personne autorisée, soit sous forme de certificat ou de déclaration comportant une attestation selon laquelle ce certificat ou cette déclaration a été établi en conformité avec les lois d'un État étranger, que le certificat ou l'attestation prenne ou non la forme d'un affidavit reçu par un fonctionnaire de l'État étranger.[. . .]
Preuve qui ne peut être admise aux termes de l'article
(10) Le présent article n'a pas pour effet de rendre admissibles en preuve dans une procédure judiciaire :
a) un fragment de pièce, lorsqu'il a été prouvé que le fragment est, selon le cas :
(i) une pièce établie au cours d'une investigation ou d'une

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or
(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

[. . .]
Definitions
In this section,
(12) "business"
"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

enquête,
(ii) une pièce établie au cours d'une consultation en vue d'obtenir ou de donner des conseils juridiques ou établie en prévision d'une procédure judiciaire,
(iii) une pièce relativement à la production de laquelle il existe un privilège qui est invoqué,
(iv) une pièce reproduisant une déclaration ou faisant allusion à une déclaration faite par une personne qui n'est pas ou ne serait pas, si elle était vivante et saine d'esprit, habile et contraignable à divulguer dans la procédure judiciaire une chose divulguée dans la pièce;
[. . .]
Définitions
Les définitions qui suivent s'appliquent au présent article.
(12) « affaires »
« affaires » Tout commerce ou métier ou toute affaire, profession, industrie ou entreprise de quelque nature que ce soit exploités ou exercés au Canada ou à l'étranger, soit en vue d'un profit, soit à d'autres fins, y compris toute activité exercée ou opération effectuée, au Canada ou à l'étranger, par un gouvernement, par un ministère, une direction, un conseil, une commission ou un organisme d'un gouvernement, par un tribunal ou par un autre organisme ou une autre autorité exerçant une fonction gouvernementale.

Annex B

VANCOUVER, B.C.

SEPTEMBER 13, 2005

(PROCEEDINGS RESUMED AT 9:42 A.M.)

JUSTICE: I have a brief statement on the subject of admissibility of documents. I'm proposing a procedure I think will be both fair and reasonably efficient.

The plaintiff and the defendant could not be farther apart. The plaintiff submits that all of the documents introduced and marked for identification by way of its expert witness, Mr. d'Ombrain, are admissible as proof of their contents under various exceptions to the hearsay rule, as business documents, public documents, ancient documents or documents coming within the principled exception according to the Supreme court's decisions in *Khan* and *Smith*.

The defendant submits that none of these documents comes within any of those exceptions. More particularly, Mr. Seifert submits that the documents are inadmissible because:

1. Some are improperly marked as exhibits to affidavits;

2. Some are mis-described by affiants;

3. Some are authored by persons who are not disinterested in the subject matter;

4. Some contain political views and opinions rather than recorded facts;

5. Some were never intended to become public and have not been accessible to the public;

6. Some do not meet the test of necessity as set out by the Supreme Court in *Smith*;

7. Some bear no circumstantial guarantee of trustworthiness or reliability;

8. Some were authored by persons who might have good reason to be hostile towards the groups whose admission to Canada was under discussion;

9. Some were authored after this claim, broadly construed, arose;

10. Some relate to the central issue in this case and should not be admitted to prove that which is for the court to decide;

11. The business records exception was never intended to cover documents as broadly worded as these documents are;

12. The documents were channeled through the Department of Justice and there is no guarantee that other relevant potentially contradictory documents are not available or that the chain of custody of the documents is intact;

13. Some of the documents were prepared outside of the authors' duties, strictly speaking;

14. Some documents record private communications and cannot be considered, therefore, public documents.

In my view, in these circumstances, I must rule on the admissibility of each document, which I undertake to do at a later point. For present purposes I suggest we proceed as follows.

Documents introduced before the remaining witnesses will be marked for identification. I will review those documents individually in the same manner as I will review the documents introduced to date. In doing so I will assume that the plaintiff will rely on its submissions that the documents are admissible under the various hearsay exceptions. I would ask the plaintiff to advise the Court if it is relying on some other ground of admissibility or if the document is being entered for a more limited purpose.

For its part, I will assume that the foregoing objections will apply to the documents introduced through the remaining witnesses and therefore it will usually be unnecessary to make further arguments on those grounds, as I will have them in mind when I review the documents.

If there should be some other kind of objection, I would appreciate being so advised, and of course where the defendant has no objection, I would also be grateful for that to be brought to my attention.

I have two options based on this manner of proceeding, to issue a freestanding judgment on the documents alone or to incorporate my judgment into my final fact-finding decision. I will leave that question aside for now, to be addressed at a later point in these hearings.

Is that clear to counsel?

MR. CHRISTIE: Yes, My Lord.

MR. BRUCKER: Yes.

JUSTICE: Mr. Christie.

MR. CHRISTIE: Thank you.

Annex C

Exhibits

Exhibit	Title/Description	Referred to by witness	Admissible		Reasons
			Yes	No	
A	Map of the Balzano Camp redrawn using a computer by Ennio Marcelli			x	- P. does not seek to admit this other than for ID. - Subject to a later ruling during commission in any case (see Exh. C-11)
B	Dismissal Slip dated May 2345 with heading "To All Guards"			x	- P does not seek to admit this
C	Statutory Declaration No. 197 of 1951 dated June 27, 1951		x		- Reliability - notarized statement, signed and sealed by notary. - N.B. evidence only of what Mr. Seifert stated to the notary (i.e. double hearsay) (see Exh. 2 of Exh. QQ)
D	Certificate of conduct dated July 5/51 with translation attached			x	- Not admissible under s. 30(1) *CanadaEvidence Act*, R.S.C. 1985, c. C-5 (CEA) - No indication of authenticity, authorship or provenance (see Exh. 3 of Exh. QQ)
E	Substitute for Lost Civil-status Certificate dated June 27/51		x		- S. 30(1), CEA - Certificate issued in the usual and ordinary course of business by a municipal registrar in Eddigehausen (see Exh. 1 of Exh. QQ)
F	Application for Citizenship of M. Seifert dated June 24, 1966		x		- Pursuant to s. 25(1), *Citizenship Act*, R.S.C. 1985, c. C-42 - Also s. 30(1), CEA as a business document
G	Affidavit of Surinder Budial sworn Dec. 8/04 with exhibits, including personnel records of Michael Seifert		x		- S. 30(1), CEA - Employment records produced in the usual and ordinary course of business by employer
H	Memorandum dated Sept. 20/46 for Mr. Robertson, External Affairs/Privy Council re Landing of refugees bearing the initials ADPH	D'Ombrain	x		- Reliability - quotes from and is corroborated by Exh. I - Handwritten notation that copies were provided to Glassco and Halliday (P.C.O. officers at the time)

I	Memo to Cabinet dated Oct. 15/45 from J. Allison Glen, Minister re Disposition of Refugees in Canada	D'Ombrain	x	- Reliability - bears P.C.O. stamp
J	Security Panel Minutes of First Meeting June 24/46	D'Ombrain	x	- s. 30(1), CEA - Minutes of meeting taken in the usual and ordinary course of the business of the Security Panel - Signed by Acting Secretary
K	Memo for the Cabinet dated May 21/46 from EWT Gill, Secretary, Cabinet Defence Committee and Memo to Cabinet Defence Committee dated May 4/46 from JWC Barclay, Acting Lieutenant commander (S) R.C.N. Secretary, Chiefs of Staff Committee	D'Ombrain	x	- Reliability - bears P.C.O. stamp - Attachment described accurately in covering memorandum
L	Security Panel Minutes of Second Meeting 8 JUL 1946	D'Ombrain	x	- Absence of seal and signature suggest diminished weight
M	Cabinet Conclusions dated August 5, 1946	D'Ombrain	x	- Absence of seal and signature suggest diminished weight
N	Letter dated Oct. 9/46 to L. St. Laurent, Minister of Justice from RCMP Comm. Wood	D'Ombrain	x	- Reliability - signed by author - Marked as "approved" and signed by Minister of Justice
O	Letter dated Feb. 7/47 from Heeney to Glen, Secretary to Cabinet	D'Ombrain	x	- Reliability - signed by author
P	Memo for the Cabinet, Sept. 22/49 from N.A. Robertson, Chairman, Security Panel	D'Ombrain	x	- Absence of seal and signature suggest diminished weight
Q	Memo for the Prime Minister - Rejection of prospective immigrants on security grounds - Sept. 21, 1949	D'Ombrain	x	- Reliability - signed by cabinet secretary - On letterhead of P.C.O.
R	Draft Memorandum for the Prime Minister re Rejection of prospective immigrants on security grounds - Sept. 16/49	D'Ombrain	x	- Reliability - bears deputy minister's stamp - As ad raft, document merits diminished weight
S	Memorandum dated Sept. 22/49 re Immigration Security Practices from EWT Gill	D'Ombrain	x	- Reliability - on P.C.O. letterhead - Refers to wording of Exh. O, issued the previous day, and to "questions of yesterday"
T	Memo for Cabinet, August 22, 1949	D'Ombrain	x	- Reliability - bears P.C.O. stamp
U	Minutes of Security Panel, Oct. 27/50	D'Ombrain	x	- s. 30(1), CEA

					- Minutes of meeting taken in the usual and ordinary course of the business of the Security Panel
V	MacNeil to Wright - 4 Dec. 1950	D'Ombrain	x		- Reliability - signed by author - Letter confirming cable (Exh. W)
W	To Major JA Wright from ST Wood, 30 Nov/50	D'Ombrain	x		- Reliability - corroborated by Exh. V
X	Application of Regulations to German Nationals and Immigrants of German Ethnic Origin, Circular No. 72	D'Ombrain	x		- S. 30(1), CEA
					- Document prepared in the usual and ordinary course of business of Dept. of Citizenship and Immigration - Signed by Acting Director
Y	Memo to Security Panel - 30 April 1952	D'Ombrain	x		- Absence of seal and signature suggest diminished weight
Z	Minutes of the 42{ nd} Security Panel Meeting - May 15, 1952	D'Ombrain	x		- S. 30(1), CEA
					- Minutes of meeting taken in the usual and ordinary course of the business of the Security Panel
AA	Letter to Officer i/c special branch from WH Kelly dated Jan 21/53 (with copy of EX 22 attached)	D'Ombrain	x		- Reliability - on letterhead of R.C.M.P. - Signed by author
BB	Memorandum to Cabinet: Security Examination of prospective immigrants, EWT Gill, Vice-Chairman, Security Panel, Privy Council Office, 4 Feb. 1947	D'Ombrain	x		- Absence of seal and signature suggest diminished weight
CC	Chart of Dept. of Citizenship and Immigration, Feb. 1951			x	- P does not seek to introduce this diagram
DD	PC 185, January 31, 1923		x		- S. 23, CEA
EE	Memorandum on Duties and Responsibilities of Security Officers attached to C.I.M. in Occupied Countries, 12 July 1948	Sauer	x		- Reliability - on letterhead of R.C.M.P.; bears stamp of recipient - Signed by author - Attachment signed both by author and recipient
FF	Letter L.H.Nicholson to Jolliffe dated July 25/46 with attachments	Sauer		x	- Attachment not admissible for truth of contents, but to indicate the understanding of the Nazi party that was circulating in government at the time.
GG	Letter to H.L. Keenleyside, Deputy Minister, Dept. Mines & Resources from S.T. Wood dated May 10/48	Sauer	x		- Reliability - on letterhead of R.C.M.P.

				- Signed by author - Bears D.M.'s stamp
HH	Letter Fortier to Harris dated June 9/50	Sauer	x	- Absence of seal and signature suggests diminished weight
II	Memorandum for Supt. McClellan, RCMP from Insp. MacNeil, re "Members of Naza Party and Waffer SS" 8/11/50	Sauer	x	- Reliability - standard form memorandum
JJ	Allied Control Authority Directive 38 Oct 14/46	Sauer	x	- Reliability - document widely circulated and referenced - Not inadmissible under s. 30(10), CEA as not admissible under s. 30(1)
KK	Memorandum for File July 9/51 Deputy Minister Citizenship and Immigration Col. Fortier	Sauer	x	- Reliability - bears author's stamp - Not inadmissible under s. 30(10), CEA as not admissible under s. 30(1)
LL	Letter from Inspector Hall to Major Wright July 11/51	Sauer	x	- Reliability - corroborated by Exh. KK - Not inadmissible under s. 30(10), CEA, as not admissible under s. 30(1)
MM	Minutes of Meeting between RCMP and Dept. of Citizenship and Immigration Feb. 26/51	Sauer	x	- S. 30(1) CEA - Document prepared in usual and ordinary course of business of government (i.e. minutes of meeting) - Not inadmissible under s. 30(10)(*a*)(*i*), (*ii*) or (*iv*)
NN	Letter from Murray to Hinton April 21/47	Sauer	x	- Reliability - signed by author
OO	Application for Assisted Passage Loan	Sauer	x	- S. 30(1), CEA - Document used in the usual and ordinary course of business of Dept. of Citizenship and Immigration - Handwritten markings diminished weight
PP	Application for Citizenship, M. Seifert		x	- See Exh. F
QQ	Affidavit of Thomas Brandes affirmed July 21, 2003, with the three exhibits			- See Exh. C, D and E above.
RR	Affidavit of Seigfried Dost affirmed July 21, 2003, with eleven exhibits		x	- S. 30(1), CEA - Documents prepared in the usual and ordinary course of municipal government business - No grounds for exclusion under s. 30(10)

					- N.B. evidence only of what was said to declarants (double hearsay)
SS	Affidavit of Hans-Ulrich Kleidt affirmed May 28, 2002, with thirteen exhibits		x		- S. 30(1), CEA - Documents prepared in the usual and ordinary course of a government pension and benefits office - No grounds for exclusion under s. 30(10) - N.B. Evidence only of what was said to declarants (double hearsay)
TT	Affidavit of Klaus Mittermaier affirmed Feb. 11, 2002, with seventeen exhibits		x		- S. 30(1), CEA - Documents prepared in the usual and ordinary course of the business of a missing persons tracing service - No grounds for exclusion under s. 30(10 - N.B. Where applicable, evidence only of what was said to declarants (double hearsay)
UU	Judgment and sentence of the Military Tribunal of Verona dated 24 November 2000				- By agreement, ruling on admissibility reserved until final arguments have been made
VV	Sentence and Reasons for Judgment of the Military Court of Appeal of Verona dated 18 October 2001				- By agreement, ruling on admissibility reserved until final arguments have been made
WW	Sentence of the Supreme Court of Cassation dated 8 October 2002				- By agreement, ruling on admissibility reserved until final arguments have been made
XX	Affidavit of Dieter Gosewinkel affirmed August 5, 2005, with five exhibits			x	- Not relevant
YY	Correspondence dated Sept. 23/43, Reichsfuehrer-S letter, re: Karl Wolff S & Chef Der Deutschen Polizei	Gentile	x		- Reliability - bears stamp of SS Personnel Main Office
ZZ	Correspondence dated Nov. 9, 1943, SS-Personalhaup "express letter" re: Dr. Harster TAMT	Gentile	x		- Reliabiity - bears stamp of Ss Personnel Main Office - Certified true copy - Under letterhead of Chief of Sicherheitspolizei and SD
AAA	Organizational Chart of the Security Police and SD in Italy, Dec. 1/43			x	- Source unknown - No indicia of reliability
BBB	Memo dated Dec. 12, 1943 re: Deployment of the Security Police and the	Gentile	x		- Absence of signature and seal suggest diminished

	SD in Italy				weight - Witness explained that this is a file copy of a document that had wide circulation and absence of signature not surprising
CCC	Order 29 MAR 1944, "Service Order No. 8"	Gentile	x		- Reliability - typed signature of Harster - Certified by signature of SS Captain
DDD	Official Order No. 12, June 27, 1944	Gentile	x		- Reliability - typed signature of Harster - Certified by signature of SS Captain
EEE	Order 13 FEB 1945, re "Service Order No. 30"	Gentile	x		- Reliability - signed by Harster
FFF	July 31, 1944, "List No..... of Recommendations for the Award of the War Merit Cross 2{ nd} Class with Swords"	Gentile	x		- Reliability - signed by Harster - Under cover of official stationery (same as Exh. GGG)
GGG	Jan. 16, 1945 "List of Recommendations, No. ..... for the Conferral of the War Merit Cross 2{ nd} Class with Swords"	Gentile	x		- Reliability - signed by Harster - Under cover of official stationery (same as Exh. FFF)
HHH	Diagram drawn by witness Carlo Gentile outlining the structure of the SS	Gentile		x	- Not evidence
III	Affidavit of Dr. Gerd R. Veberschar and Doc. 386, Report 24 DEC 1944, "Report on the General's Inspection Tour to Verona on 23 Dec. 1944"	Gentile	x		- Reliability - signed by author - N.B. evidence only of what was said to declarant (double hearsay)
JJJ	Letter of Reference, March 22, 1945	Gentile	x		- Reliability - signed by Titho - Under letterhead of Commander of the Sicherheitspolizei and SD at Bolzano
KKK	Letter April 16, 1945 to Miss Paula Plattner in Klausen	Gentile	x		- Reliability - signed by authors - Under letterhead of Commander of the Sicherheitspolizei and SD, at Bolzano
LLL	Telegram from Titho Dec. 16/44 "re: transport of Jews - on 14:1244 at 18:00 hours"	Gentile	x		- Reliability - bears stamps and initials - Typed signature of Tito - Standard form telegram
MMM	Affidavit of Timothy K. Nenninger, with				- Individual exhibits dealt

	exhibits				with separately (see Exh. JJJ, KKK) - Schoster report subject to a separate ruling (see Exh. 38)
NNN	Affidavit of Piotr Setkiewicz sworn May 21/02, with exhibits	Black	x		- S. 30(1), CEA - Quarantine list is a document kept in the usual and ordinary course of business of camp - No basis for exclusion under s. 30(10)
OOO	Affidavit of Babette Heusterberg sworn July 28/05, with exhibits	Black	x		- Reliabillity - Exh. 1-6 bear signatures, seals and letterhead - Exh. 7, s. 30(1), CEA - personnel card is a document prepared in usual and ordinary course of business of armed forces.
PPP	Affidavit of Babette Heusterberg sworn Nov. 28/02, with exhibits	Black	x		- S. 30(1), CEA - Immigration and naturalization forms prepared in the usual and ordinary course of business of determining citizenship - N.B. evidence only of what was said to declarant (double hearsay)
QQQ	Footnote 49 to Dr. Peter Black Report: Heydrich to Daluege, Oct. 30/41	Black		x	- No evidence supporting provenance, authenticity, accuracy of copy of translation
RRR	Footnote 87 to Dr. Peter Black Report: "Decree on a Special Jurisdiction in Criminal Matters for Members of the SS and for Persons Belonging to police Units in Special Deployment" signed Goring, Frick and Lammers, Oct. 17/39	Black		x	- No evidence supporting provenance, authenticity, accuracy of copy of translation
SSS	Affidavit of Dr. Michael Hollman as well as copies of exhibits BBB, CCC, EEE, FFF, GGG & LLL)	Gentile			- See separate rulings on exhibits
TTT	Affidavit of Stephan Kuhmayer sworn Feb. 25/02, with exhibits		x		- S. 30(1), CEA - Documents prepared in the usual and ordinary course of keeping records of persons serving the German forces - No grounds for exclusion under s. 30(10)
UUU	Affidavit of Herbert Weibman sworn July 21, 2003, with exhibits		x		- S. 30(1), CEA - Document prepared in the

					usual and ordinary course of municipal government - No grounds for exclusion under s. 30(10)
VVV	Affidavit of Lyudmila Ivanovna Okorokova sworn May 23, 2002, with exhibits		x		- S. 30(1), CEA - Exhibits consist of records prepared in the usual and ordinary course of municipal government - No grounds for exclusion under s. 30(10)
WWW	Affidavit of Antonio Paolo Arman affirmed June 30/05, with exhibits		x		- S. 30(1), CEA - Death certificates prepared in usual and ordinary course of business of municipal registry - No grounds for exclusion under s. 30(10)
XXX	Affidavit of Heather Yasamee affirmed July 5/05, with two exhibits		x		- Reliability - Exh. 1 is signed and on letterhead of Military Prosecutor General - Exh. 2 signed and on letterhead of Control Office for Germany and Austria - N.B. note prejudicial effect of Exh. 1
YYY	Affidavit of Leonardo Simeoni affirmed Oct. 8/05, with exhibit		x		- S. 23, CEA - N.B. offered for limited purpose of showing conviction of Cologna (see para. 28, Statement of Claim)
CA	Acetate: Piantina Del campo rielaborata al computer da Eennio Marcelli/Diagram of the camp prepared by witness Ennio Marcelli	Marcelli		x	- See Exh. C-11
CB	10 original photographs from which C10 (exhibit) was prepared/Note: per direction of the Court, returned to Yves Parent.	Various	x		- See Exh. C-10
CC	3 page facsimile dated September 28, 2005 from Museo Storico in Trento to Caroline Sassano re: Camp diagram relative to witness Ennio Marcelli (Document in Italian)	Marcelli	x		- Identified as source for Marcelli drawing
CD	Handwritten notes by Paolo Giachini and Elena Nicola regarding conversations overheard between witness Teresa Scala (during breaks in her testimony) and two men: in Italian & English			x	- Remains an exhibit for identification only, subject to any further argument at the end of the case
CE	Affidavit of Lucy Segatti sworn September 2, 2005 covering diary of Berto		x		- Provides additional context for excerps used in

	Perotti, with translated excerpts.			cross-examination - N.B. not admitted for proof of contents
CF	Articles attributed to Enrico Pedrotti	x		- Provides additional context for excerps used in cross-examination - N.B. not admitted for proof of contents
CG	Statements of Berto Perotti (deceased)	x		- Reliability - sworn testimony and statements (Documents 653 and 656)
CH	Statements of Sergio Passera	x		- Reliability - Sworn testimony and statements (Documents 642, 643, 644 and 646)
CI	Excerpts (and translation) from book by Andrea Gaggero entitled "Vestio Da Oma" with a copy of exhibit C30 attached	x		- Provides addition context for excerpts used in cross-examination - N.B. not admitted for proof of contents
CJ	Amendment to translation of Exhibit C19 - From Steven Guttenberg, Verona Italy, Oct. 18/05	x		- Minor amendment of translation of Exh. C-19
CK	Extract from text by Dario Venegoni entitled "Uomini, Donne E Bambini Nel Lager Di Bolzano"		x	- Does not amplify or clarify anything used in cross-examination

End of Document

Pages 313 to / à 318
are withheld pursuant to section
sont retenues en vertu de l'article

23

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Blue, Amy

From: Tarlton, Jonathan
Sent: Wednesday, February 04, 2015 11:35 AM
To: Mah, Janice; Sweeney, Justina
Subject:

From: Mah, Janice
Sent: Wednesday, February 04, 2015 11:01 AM
To: Sweeney, Justina
Cc: Tarlton, Jonathan
Subject:

Justina,

From: Sweeney, Justina
Sent: Wednesday, February 04, 2015 10:32 AM
To: Mah, Janice
Cc: Tarlton, Jonathan
Subject:

s.23

Hi Janice,

Justina

Justina Sweeney
Legal Assistant, Civil Litigation & Advisory Section

Pages 321 to / à 327

are withheld pursuant to section

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23

of the Access to Information Act

de la Loi sur l'accès à l'information

Blue, Amy

From: Mah, Janice
Sent: Wednesday, February 04, 2015 10:34 AM
To: Sweeney, Justina
Cc: Tarlton, Jonathan
Subject: RE: re FNCFCSC et al. v. AGC (T1340/7008) - final submissions

Thanks Justina!
Should not be a problem. I'll let you know when it's done.

From: Sweeney, Justina
Sent: Wednesday, February 04, 2015 10:32 AM
To: Mah, Janice
Cc: Tarlton, Jonathan
Subject: re FNCFCSC et al. v. AGC (T1340/7008) - final submissions

Hi Janice,

I am attaching the signed letter submissions. Please note the following changes that we made.

Page 2 – removed the word lay 1st para.
Last page – removed Sabet/Levesque from the cc's – added David Taylor
Added a last page – List of Authorities

This document is scanned into iCase – because of the few changes – I rescanned the whole document & the amended word version is in iCase – saved as Final Submissions. Are you able to attach these into the document you have?

Justina

<< File: 14732757.pdf >>

Justina Sweeney
Legal Assistant, Civil Litigation & Advisory Section

Blue, Amy

From: Sweeney, Justina
Sent: Wednesday, February 04, 2015 3:09 PM
To: Krista Robertson; 'Kimberlee Ford'
Cc: Tarlton, Jonathan; Mah, Janice
Subject: FW: re FNCFCSC et al. v. AGC (T1340/7008) - Response of the AGC to the Tribunal Ruling 2015 CHRT 1

Hi Krista and Kim,

Attached please find a copy of our email to the Tribunal and counsel of today's date, with attachment.
Enjoy the rest of your day.

Justina

s.19(1)

From: Sweeney, Justina
Sent: February 4, 2015 2:41 PM
To: 'Dragisa.Adzic@chrt-tcdp.gc.ca'
Cc: 'DANIEL.POULIN@chrc-ccdp.gc.ca'; 'sarah.pentney@chrc-ccdp.gc.ca'; 'samar.musallam@chrc-ccdp.gc.ca'; 'philippe.dufresne@chrc-ccdp.gc.ca'; 'dtaylor@juristespower.ca'; 'dndaystar@nncfirm.ca'; 'swuttke@afn.ca'; [redacted]; 'JustinS@stockwoods.ca'; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; McCormick, Terry; Harvey, Ainslie; Mah, Janice; Cameron, Sabrina
Subject: FW: re FNCFCSC et al. v. AGC (T1340/7008) - Response of the AGC to the Tribunal Ruling 2015 CHRT 1

Dear Mr. Adzic and counsel,

Attached please find the Response of the AGC to the Tribunal Ruling 2015 CHRT 1.
Have a good afternoon.

Regards,

Justina Sweeney,
Assistant to Jonathan Tarlton

AFN - RESPONSE OF THE AGC TO...

Justina Sweeney
Legal Assistant
Civil Litigation & Advisory Section
Atlantic Regional Office / Bureau Régional de l'Atlantique
Department of Justice / Ministère de la Justice Canada
5251 Duke Street, Suite 1400 / 5251, rue Duke, Pièce 1400
Halifax, Nova Scotia B3J 1P3 / Halifax (Nouvelle-Écosse)

tel. / tél.: (902) 426-6982
fax / télec.: (902) 426-8796
mailto:justina.sweeney@justice.gc.ca
Government of Canada / Gouvernement du Canada

Blue, Amy

From: Sweeney, Justina **s.19(1)**
Sent: Friday, February 13, 2015 2:10 PM
To: 'Dragisa.Adzic@chrt-tcdp.gc.ca'
Cc: 'sarah.pentney@chrc-ccdp.gc.ca'; 'DANIEL.POULIN@chrc-ccdp.gc.ca'; 'philippe.dufresne@chrc-ccdp.gc.ca'; 'samar.musallam@chrc-ccdp.gc.ca'; 'swuttke@afn.ca'; 'dndaystar@nncfirm.ca'; 'dtaylor@powerlaw.ca'; 'justins@stockwoods.ca'; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; Mah, Janice; McCormick, Terry; Harvey, Ainslie
Subject: re FNCFCSC et al. v. AGC (T1340/7008)

Dear Mr. Adzic,

Attached please find correspondence from Jonathan Tarlton of today's date in the above noted matter.
Have a good afternoon.

Regards,

Justina Sweeney,
Assistant to Jonathan Tarlton

14774301.pdf

Justina Sweeney, Legal Assistant
Civil Litigation & Advisory Section
Atlantic Regional Office / Bureau Régional de l'Atlantique
Department of Justice / Ministère de la Justice Canada
5251 Duke Street, Suite 1400 / 5251, rue Duke, Pièce 1400
Halifax, Nova Scotia B3J 1P3 / Halifax (Nouvelle-Écosse)
tel. / tél.: (902) 426-6982
fax / télec.: (902) 426-8796
mailto:justina.sweeney@justice.gc.ca
Government of Canada / Gouvernement du Canada

Department of Justice Canada | **Ministère de la Justice Canada**

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-8796
E-Mail: jonathan.tarlton@justice.gc.ca

Via Email to dragisa.adzic@chrt-tcdp.gc.ca

February 13, 2015

Dragisa Adzic
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street - 11th Floor
Ottawa, Ontario K1A 1J4

Dear Mr. Adzic:

Re: ***First Nations Child and Family Caring Society et al. v Attorney General of Canada*** **(T1340/7008)**

We have just learned that there is typographical error in our February 4, 2015 letter at page 4, where we inadvertently refer to a document as being Tab 172, instead of Tab 171, which it was supposed to be.

We have correctly identified the document as Tab 171 in our chart accompanying our earlier letter. We thank our friends from the Commission for bringing this matter to our attention earlier today and we apologize for any inconvenience.

Respectfully yours,

Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

JDNT/jm

cc: Philippe Dufresne / Daniel Poulin / Sarah Pentney / Samar Musallam, Counsel for the Commission
David Taylor, Counsel for the Caring Society
David Nahwegahbow / Stuart Wuttke, Counsel for the AFN
Michael Sherry, Counsel for the Chiefs of Ontario
Justin Safayeni, Counsel for Amnesty International

Canada

Blue, Amy

From: Sweeney, Justina
Sent: Friday, February 13, 2015 1:47 PM
To: 'philippe.dufresne@chrc-ccdp.gc.ca'; 'DANIEL.POULIN@chrc-ccdp.gc.ca'; 'sarah.pentney@chrc-ccdp.gc.ca'; 'samar.musallam@chrc-ccdp.gc.ca'
Cc: 'swuttke@afn.ca'; 'dndaystar@nncfirm.ca'; 'dtaylor@powerlaw.ca'; [redacted] 'justins@stockwoods.ca'; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; Mah, Janice; McCormick, Terry; Harvey, Ainslie
Subject: FNCFCSC et al. v. AGC (T1340/7008)

s.19(1)

Good afternoon,

Attached please find correspondence from Jonathan Tarlton of today's date in the above noted matter.

Have a great week-end.

Regards,

Justina

14774100.pdf

Justina Sweeney,
Assistant to Jonathan Tarlton
Civil Litigation & Advisory Section
Atlantic Regional Office / Bureau Régional de l'Atlantique
Department of Justice / Ministère de la Justice Canada
5251 Duke Street, Suite 1400 / 5251, rue Duke, Pièce 1400
Halifax, Nova Scotia B3J 1P3 / Halifax (Nouvelle-Écosse)
tel. / tél.: (902) 426-6982
fax / télec.: (902) 426-8796
mailto:justina.sweeney@justice.gc.ca
Government of Canada / Gouvernement du Canada

Department of Justice Canada
Ministère de la Justice Canada

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-2329
E-Mail: jonathan.tarlton@justice.gc.ca

Our File:
Notre dossier: AR-800702

Via Email

February 13, 2015

Philippe Dufresne, Daniel Poulin, Sarah Pentney and Samar Musallam,
Canadian Human Rights Commission
Litigation Services Division
344 Slater Street
Ottawa ON K1A 1E1

Dear Counsel:

Re: FNCFCSC et al. v. Attorney General of Canada (Tribunal File T1340/7008)

Thank you for your letter dated today. The reference to Tab 172 at page 4 of our letter dated February 4, 2015 is an inadvertent typo and we meant to identify the document as Tab 171. Our chart that we included with our submissions correctly identifies and lists it as such.

We appreciate your bringing this matter to our attention and we will advise the Tribunal accordingly.

Yours truly,

Jonathan Tarlton
Senior Counsel
Civil Litigation and Advisory Services

JT/js

cc: David Taylor, Counsel for the Caring Society
David Nahwegahbow / Stuart Wuttke, Counsel for the AFN
Michael Sherry, Counsel for the Chiefs of Ontario
Justin Safayeni, Counsel for Amnesty International

Canada

Blue, Amy

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 11:50 AM
To: Mah, Janice
Subject: FW: FNCFCSC et al. v. AGC (T1340/7008)
Attachments: Scanned from a Xerox multifunction device.pdf; December 1, 2014 Letter.pdf; Fwd: FNCFCSC et al. v. AGC (T1340/7008); re FNCFCSC et al. v. AGC (T1340/7008) - Proposed Joint Response

Over to you to help us sort this out.

From: Sarah Pentney [mailto:sarah.pentney@chrc-ccdp.gc.ca]
Sent: Friday, February 13, 2015 11:47 AM
To: Harvey, Ainslie; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; McCormick, Terry
Cc: Stuart Wuttke; Daniel Poulin; MELANIE Matte; Samar Musallam; Mah, Janice; Sweeney, Justina; Cameron, Sabrina; David Nahwegahbow; KimberlyNewby; Thomas Milne; David Taylor; Mike Sherry; Justin Safayeni
Subject: FNCFCSC et al. v. AGC (T1340/7008)

Good morning Counsel,

I hope this finds you all well. Please find attached correspondence from the Commission in the above-noted matter. If you have any questions, please don't hesitate to contact me.

Thanks very much and have a great weekend.

Sarah

Sarah Pentney
Counsel | Avocate
Litigation Services Division | Division des services du contentieux
Canadian Human Rights Commission | Commission canadienne des droits de la personne
344 Slater Street | 344 rue Slater
9th Floor | 9e étage
Ottawa, ON
K1A 1E1
Tel. / Tél. : (613) 943-9532
Fax / Télec. : (613) 993-3089
www.chrc-ccdp.ca

Canadian human rights commission | Commission canadienne des droits de la personne

Litigation Services Division | Division des services du contentieux

Direct Line/Ligne directe: (613) 947-6399
Facsimile/télécopieur: (613) 993-3089
Email/courriel: Daniel.Poulin@chrc-ccdp.gc.ca

BY E-MAIL

February 13, 2015

Jonathan Tarlton
Melissa Chan
Patricia MacPhee
Nicole Arsenault
Department of Justice Canada
Civil Litigation and Advisory
5251 Duke St., Suite 1400
Halifax, NS B3J 1P3

Ainslie Harvey
Terry McCormick
Department of Justice Canada
Litigation Services
Robson Court
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9

Dear Counsel:

Re: ***FNCFCSC et al. v. Attorney General of Canada***
Tribunal File No.: T1340/7008

This is further to your letter of February 4, 2015, providing written representations to the Canadian Human Rights Tribunal regarding the documents subject to their ruling dated January 14, 2015 (2015 CHRT 1) ordering the following:

> Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

The Canadian Human Rights Commission has reviewed the Attorney General's written representations, and noticed that at page 4, you refer to Exhibit HR-09, Tab 172, which is not listed in Appendix B (but rather in Appendix A) of our letter of December 1, 2014 (attached for ease of reference).

... /2

The Commission understands that based on its November 25, 2014 e-mail correspondence to the parties (attached), and the Attorney General's letter in response dated that same day (also attached), Exhibit HR-09, Tab 172 is a document that all parties consented to being removed from the Book of Documents.

Since it does not form part of the record before the Tribunal in the above-noted matter, and does not fall within the scope of the Tribunal's order of January 14, 2015, it is unclear on what basis this document is referred to in your written submissions. Thus, the Commission respectfully requests that the Attorney General clarify this matter with the Tribunal at the earliest opportunity.

If you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

Daniel Poulin
Counsel

c.c.

David Taylor
Counsel for the Complainant
First Nations Child and Family Caring Society of Canada

David C. Nahwegahbow
Counsel for the Complainant
Assembly of First Nations

Stuart Wuttke
Counsel for the Complainant
Assembly of First Nations

Michael W. Sherry
Counsel for the Interested Party
Chiefs of Ontario

Justin Safayeni
Counsel for the Interested Party
Amnesty International

Blue, Amy

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 12:27 PM
To: Mah, Janice
Subject: RE: AFN

[redacted]

From: Mah, Janice
Sent: Friday, February 13, 2015 12:24 PM
To: Tarlton, Jonathan
Subject: RE: AFN

[redacted]

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 12:01 PM
To: Mah, Janice
Subject: RE: AFN

[redacted]

From: Mah, Janice
Sent: Friday, February 13, 2015 12:00 PM
To: Tarlton, Jonathan
Subject: RE: AFN

[redacted]

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 11:55 AM
To: Mah, Janice
Subject: RE: AFN

s.23

[redacted]

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 11:53 AM
To: Mah, Janice
Subject: AFN

[redacted]

Jonathan D.N. Tarlton

Senior Counsel | Avocat-conseil
Department of Justice Canada | Ministère de la Justice Canada
Atlantic Regional Office | Bureau régional de l'Atlantique

Suite 1400, Duke Tower | Pièce 1400, Tour Duke
5251 Duke Street | 5251 rue Duke Halifax, Nova Scotia | Halifax, Nouvelle Écosse B3J 1P3

tel. | tél.: (902) 426-5959
fax | téléc.: (902) 426-8796
jonathan.tarlton@justice.gc.ca

Pages 340 to / à 359

are withheld pursuant to section

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of the Access to Information Act

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Blue, Amy

From: Mah, Janice
Sent: Friday, February 13, 2015 11:56 AM
To: Tarlton, Jonathan
Subject: RE: FNCFCSC et al. v. AGC (T1340/7008)

It appears to just be a typo. Your letter says Tab 172 (CHRC 596) whereas it should have said Tab 171 (CHRC 596).

Tab 171 is properly part of Appendix B. Sorry that I did not catch that before the letter went out!

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 11:50 AM
To: Mah, Janice
Subject: FW: FNCFCSC et al. v. AGC (T1340/7008)

Over to you to help us sort this out.

From: Sarah Pentney [mailto:sarah.pentney@chrc-ccdp.gc.ca]
Sent: Friday, February 13, 2015 11:47 AM
To: Harvey, Ainslie; Tarlton, Jonathan; Chan, Melissa; Arsenault, Nicole; MacPhee, Patricia; McCormick, Terry
Cc: Stuart Wuttke; Daniel Poulin; MELANIE Matte; Samar Musallam; Mah, Janice; Sweeney, Justina; Cameron, Sabrina; David Nahwegahbow; KimberlyNewby; Thomas Milne; David Taylor; Mike Sherry; Justin Safayeni
Subject: FNCFCSC et al. v. AGC (T1340/7008)

Good morning Counsel,

I hope this finds you all well. Please find attached correspondence from the Commission in the above-noted matter. If you have any questions, please don't hesitate to contact me.

Thanks very much and have a great weekend.

Sarah

Sarah Pentney
Counsel | Avocate
Litigation Services Division | Division des services du contentieux
Canadian Human Rights Commission | Commission canadienne des droits de la personne
344 Slater Street | 344 rue Slater
9th Floor | 9e étage
Ottawa, ON
K1A 1E1
Tel. / Tél. : (613) 943-9532
Fax / Télec. : (613) 993-3089

www.chrc-ccdp.ca

Blue, Amy

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 12:28 PM
To: Mah, Janice
Subject: RE: AFN

[redacted]

From: Mah, Janice
Sent: Friday, February 13, 2015 12:27 PM
To: Tarlton, Jonathan
Subject: RE: AFN

s.23

[redacted]

From: Tarlton, Jonathan
Sent: Friday, February 13, 2015 12:16 PM
To: Mah, Janice
Subject: AFN

[redacted]

Jonathan D.N. Tarlton

Senior Counsel | Avocat-conseil
Department of Justice Canada | Ministère de la Justice Canada
Atlantic Regional Office | Bureau régional de l'Atlantique
Suite 1400, Duke Tower | Pièce 1400, Tour Duke
5251 Duke Street | 5251 rue Duke Halifax, Nova Scotia | Halifax, Nouvelle Écosse B3J 1P3

tel. | tél.: (902) 426-5959
fax | téléc.: (902) 426-8796
jonathan.tarlton@justice.gc.ca

Pages 363 to / à 404

are withheld pursuant to section

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de la Loi sur l'accès à l'information

Hicks, Catherine

From: Chan, Melissa
Sent: March-07-16 11:13 AM
To: Kontos, Alexis; Tarlton, Jonathan
Cc: Blue, Amy
Subject: RE: AFN

Follow Up Flag: Follow up
Flag Status: Completed

Thank you for your comments Alexis.

From: Kontos, Alexis
Sent: Monday, March 07, 2016 11:05 AM
To: Tarlton, Jonathan
Cc: Chan, Melissa
Subject: RE: AFN

Hi Jonathan –

- A.

From: Tarlton, Jonathan
Sent: Friday, March 04, 2016 4:08 PM
To: Lovell, John <John.Lovell@justice.gc.ca>; Kontos, Alexis <Alexis.Kontos@justice.gc.ca>; 'Latham, Jane (HC/SC)' <jane.latham@canada.ca>; Wilson, Heather <Heather.Wilson@justice.gc.ca>; Fairbairn, Douglas (AADNC-AANDC) <Douglas.Fairbairn@aadnc-aandc.gc.ca>; Moen, Amy (FIN) <Amy.Moen@fin.gc.ca>
Cc: Chan, Melissa <Melissa.Chan@justice.gc.ca>; MacPhee, Patricia <Patricia.MacPhee@justice.gc.ca>; Kropp, Douglas <Douglas.Kropp@justice.gc.ca>; Leduc, Sandra <Sandra.Leduc@justice.gc.ca>; Hansen, David <David.Hansen@justice.gc.ca>; Blue, Amy <Amy.Blue@justice.gc.ca>; Aaron, David <David.Aaron@justice.gc.ca>
Subject: AFN
Importance: High

s.23

Thanks,

Jonathan

Jonathan D.N. Tarlton

Senior Counsel | Avocat-conseil
Department of Justice Canada | Ministère de la Justice Canada

Atlantic Regional Office | Bureau régional de l'Atlantique
Suite 1400, Duke Tower | Pièce 1400, Tour Duke
5251 Duke Street | 5251 rue Duke Halifax, Nova Scotia | Halifax, Nouvelle Écosse B3J 1P3

tel. | tél.: (902) 426-5959
fax | téléc.: (902) 426-8796
jonathan.tarlton@justice.gc.ca

Pages 407 to / à 429

are withheld pursuant to section

sont retenues en vertu de l'article

23

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de la Loi sur l'accès à l'information

Page 430

is withheld pursuant to sections

est retenue en vertu des articles

23, 69(1)(g) re (d), 69(1)(g) re (e)

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de la Loi sur l'accès à l'information

Pages 431 to / à 433

are withheld pursuant to section

sont retenues en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Pages 434 to / à 435
are withheld pursuant to section
sont retenues en vertu de l'article

23

of the Access to Information Act
de la Loi sur l'accès à l'information

Page 436

is withheld pursuant to section

est retenue en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Page 437

is withheld pursuant to sections

est retenue en vertu des articles

23, 69(1)(g) re (d), 69(1)(g) re (e)

of the Access to Information Act

de la Loi sur l'accès à l'information

Pages 438 to / à 473

are withheld pursuant to section

sont retenues en vertu de l'article

23

of the Access to Information Act

de la Loi sur l'accès à l'information

Page 474

is withheld pursuant to sections

est retenue en vertu des articles

23, 69(1)(g) re (d), 69(1)(g) re (e)

of the Access to Information Act

de la Loi sur l'accès à l'information

Page 475

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23

of the Access to Information Act

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Pages 476 to / à 492

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23

of the Access to Information Act

de la Loi sur l'accès à l'information

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

RESPONDENT'S SUBMISSIONS ON REMEDY

Jonathan Tarlton, Melissa Chan & Patricia MacPhee
JUSTICE CANADA
Atlantic Regional Office
5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3

The Attorney General of Canada, on behalf of the Respondent, the Minister of Indian and Northern Affairs Canada ("Canada"), makes the following submissions on the issue of remedy:

1. Canada accepts the Tribunal's decision and looks forward to working with the parties to make immediate and long-term changes to the funding of child welfare on reserve.

IMMEDIATE RELIEF

2. As a first step and before full-scale reform, Canada will consider certain immediate relief measures to support services for First Nations children and families living on reserve while long-term reform is being implemented. Such immediate relief measures could include:

- adjustments to inadequacies in the Operations and Prevention streams of the formulas through additional investments to update existing funding agreements in support of program integrity;
- increases per child service purchase amount (including for prevention services);
- further roll out of prevention funding across jurisdictions;
- additional maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements;
- funding for intake and investigation services;
- upward adjustments for agencies with more than 6% of children in care;
- beginning an engagement process going forward in conjunction with a National Advisory Committee and Regional Tables to work on medium and long-term transition; and

- beginning broader discussions around Jordan's Principle.

3. Canada will provide additional details on immediate relief investments following the Federal Budget announcement on March 22, 2016. Should the federal budget include measures pertaining to immediate relief investments, Canada will advise the parties and the panel.

4. The Complainants have requested a commitment that Canada not reduce or restrict funding to the FNCFS Program. Canada agrees to make this commitment.

5. Canada also supports the new iteration of the Canadian Incidence Study and has already taken part in preliminary discussions with the Public Health Agency of Canada.

6. Department and program staff currently receive cultural awareness training, including Blanket Exercise, Aboriginal Awareness Workshops and Indigenous Community Development. Canada also remains open to future discussions on improving cultural sensitivity of its employees by building upon these existing initiatives.

NATIONAL ADVISORY COMMITTEE

7. In order to begin the necessary and critical reform of the FNCFS Program, Canada commits to the immediate re-establishment of the National Advisory Committee. The joint AFN/INAC National Advisory Committee met regularly from 2001-2008, and its main objective was to oversee the implementation of the National Policy Review Recommendations.

8. Regional Tri-partite Tables and Agency Director Tables will be established within six months of the Tribunal's decision on remedies.

9. Canada has already approached the parties to initiate discussions and to begin configuring the Committee to include provincial and territorial representation and to add new members as needed.

10. Canada proposes the Committee be co-chaired by AFN and INAC, as proposed by the Complainants. This was also the structure of the previous version of the Committee. The initial meeting of the Committee will include discussions on membership and the proposed way forward. Subsequent process and timelines for longer-term activities will be guided by the Committee, subject to seeking necessary policy and funding authorities.

11. Establishment of the Committee is the crucial first step in addressing the medium to long-term changes to the FNCFS Program.

CHANGES TO THE FNCFS PROGRAM

12. Canada is committed to a full-scale reform of the child welfare program. In the interim, Canada proposes to use existing policy and funding authorities for current services to minimize disruption and facilitate the provision of the immediate relief measurers until long-term reform can be implemented.

13. Canada commits to working closely with key partners to reform the child welfare program, including First Nations Child and Family Service Agencies, front-line service providers, communities, leadership and organizations, as well as provincial and Yukon governments. All of these partners have important voices and perspectives that must be heard and considered in order to make changes that will best serve the needs of First Nations children and families on reserve.

14. Canada suggests that two to three months would be an appropriate timeframe for the parties to develop a fully-resourced engagement plan for the broader reform. Canada further suggests that the resulting program reform options could be developed within the subsequent twelve months.

15. Canada endeavors to seek the necessary support for program reform from provincial/territorial governments, as well as from First Nations and other interested and affected parties. Substantive reform may also require approval of necessary policy and funding authorities prior to implementation. The timeframe to

secure such approvals is not within the exclusive control of either Canada or the Complainants.

16. Some of the specific changes proposed by the Complainants to the funding formula are based on dated studies and information. Canada is concerned this approach will not accurately reflect the current day needs of First Nations children and families.

17. For example, the formula proposed by the Caring Society is an updated version of the 2005 National Program Manual Directive 20-1 Operations funding formula. A preliminary analysis applying this formula for all FNCFS service providers indicates that operations funding amounts would decrease for a significant proportion of current funding recipients when compared to 2015-16 funding amounts, a reduction which Canada cannot support.

18. Further, the proposed formula also does not take into account regional differences, such as in British Columbia where all agencies would receive the same funding, regardless of their delegation and services that they provide; or the cost-sharing arrangement in Manitoba (60%/40%); or agency agreements with other provinces for child welfare services.

19. The FNCFS Program has undertaken costing analysis for proposed new investments through a comprehensive cost-driver study and trend analysis, based on the most current data available by jurisdiction. The updated amounts, currently under consideration, more accurately reflect the needs and requirements of the FNCFS Program and are still expected to be finalized and adjusted during tripartite discussions.

ONTARIO AND THE 1965 WELFARE AGREEMENT

20. Review of the 1965 Ontario Welfare Agreement requires medium to long-term engagement and consultation. The Agreement is between the federal government and the province of Ontario; therefore changes cannot be made to the Agreement unilaterally. Canada will actively work with Ontario and stakeholders, such as First

Nations organizations, leadership, communities, agencies and front-line service providers to achieve the necessary reforms. Changes may also require new policy and funding authorities for the Government of Canada.

21. Canada will also consider the request for band representative funding, subject to the availability of departmental or additional funds.

22. Canada will be approaching the appropriate parties over the coming weeks to request participation in planning sessions, including how to best address the review of the 1965 Agreement.

FUNDING FOR LEGAL COSTS

23. The Tribunal has requested further details with respect to the funding of legal costs related to child welfare.

24. The FNCFS Program provides an initial allocation of $5000 in funding for legal fees and costs as an eligible expense as part of agency operations funding. This funding is not capped. Given the scope and range of legal costs that service providers incur, Canada recognizes the need to address the issue and arrive at more comprehensive criteria for legal cost coverage. This work will require thorough jurisdiction-by-jurisdiction analysis of how best to align federal funding support with current provincial practices that vary across the country.

25. Canada has considered the proposal to use the schedule of rates for outside counsel, as published on the Justice website. However, these are not necessarily a useful substitution for legal services related to child welfare. An alternate approach is to use the provincial legal aid rates for child welfare proceedings. Given that child welfare proceedings are governed by provincial legislation, Canada is of the view they are a more appropriate guideline. Generally, such provincial rates take into

account such factors as: geographic location, the nature of the proceeding (child welfare) and counsel experience.[1]

JORDAN'S PRINCIPLE

26. Changes to Jordan's Principle will have an impact beyond the parties and require engagement with a wide range of partners. Canada proposes to establish a process and begin engagement with these key partners within the next three months. This will include a review of the definition of Jordan's Principle, with a view to expanding it and improving the way in which it is implemented.

27. Without pre-determining the work that will be undertaken by Canada and its partners in developing an approach and timelines, Canada suggests that options for changes to Jordan's Principle could be developed within twelve months.

28. In order to make progress in the short term, Canada will convene discussions among federal partners to improve existing approaches to addressing Jordan's Principle. Initial discussions around modifications to existing internal processes have already begun. In addition, Canada proposes to put in place dedicated resources to undertake the necessary activities to support next steps.

29. Canada agrees with the AFN that discussions concerning the full implementation of Jordan's Principle should be part of the engagement on long-term remedies. Substantive and long-term change may also require approval of necessary policy and funding authorities prior to implementation.

30. Canada remains open to support future academic scholarship and recurring conferences on child welfare issues, including on Jordan's Principle and culturally-

[1] In some instances, they also set out the number of expected hours for certain proceedings – routine case management conferences versus trials. For example, in Manitoba, the Civil Legal Services rate is $171 per hour; in Alberta, legal services and related costs are $125 per hour for up to a maximum of 30 hours of non-court time; in Saskatchewan, general preparation fees are set at $88 per hour for up to 10 hours, court proceedings – at $88 per hour, case resolution processes at $88 per hour for up to 10 hours, and hearings at $88 per hour or $540 for provincial court trial, $860 for Queen's Bench trial.

based child welfare vision, as well as other related research on issues that were not captured within the scope of the January 26, 2016 decision.

FEDERAL SPENDING POWER PRINCIPLES

31. In ordering remedies, the Tribunal must be sensitive to the separation of functions between the executive and legislative branches of government. This means giving due consideration to the process by which Canada can disburse public funds for child welfare on reserve.

32. The authority to spend is derived from the annual *Appropriation Acts*. The Minister can only provide funding for child welfare programs on reserves to the extent that funds have been authorized for that purpose. The Minister is constrained by the rules and restrictions put into place by the Treasury Board, the statutory committee designated by Parliament to oversee financial management in government.

33. Canada is committed to reform in a manner that respects the authority of Parliament to allocate public funds.

CONCLUSION

34. Canada is committed to the reform of the Indigenous child welfare system. Immediate relief will include increased funding and cooperation with the parties and key partners with the aim of achieving long-term substantive reform.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 10, 2016

Jonathan Tarlton
Melissa Chan
Patricia MacPhee

Pages 502 to / à 561

are withheld pursuant to section

sont retenues en vertu de l'article

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